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Symbolic twigs and clumps of soil no longer are essential props at real estate closings[1] but modern American conveyancing does have its rituals. In most states, for example, a transferee should insist that the transferor appear before a notary public and acknowledge execution of the conveyance.[2] The transferee also should make certain that the notary affixes a proper certificate of acknowledgment to the conveyance. An omitted or defective acknowledgment will not invalidate the conveyance between the parties in most states,[3] but it may well produce other calamitous consequences. The defectively formalized conveyance often is not eligible for recording in the official land records,[4] and even if the transferee makes sure the instrument is physically placed in the records where a reasonably diligent title searcher would find it, the conveyance will not be given effect as constructive notice of the transaction.[5] Thus, a subsequent purchaser who fails to search the records, or who searches them poorly, may prevail over the initial transferee[6] simply because the earlier conveyance lacks a proper notary's certificate. Moreover, the defectively formalized convey-

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1. These props were ceremoniously employed in livery of seisin. *See* T. BERGIN & P. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 12 (1966). The ceremony never really caught on in the colonies. See text accompanying note 19 *infra*.

2. The acknowledgment and related formalities are explained at notes 22-26 & accompanying text *infra*.

3. See note 34 & accompanying text *infra*.

4. See notes 56-59 & accompanying text *infra*.

5. See note 60 & accompanying text *infra*.

6. If the subsequent purchaser sees the defectively formalized conveyance in the land records, however, he or she probably will be charged with actual notice and therefore will take subject to the earlier interest. See note 66 & accompanying text *infra*.

ance may be useless as evidence of title in any litigation. The transferee who claims title under the conveyance probably will be forced to make some preliminary showing of the instrument's authenticity before the court will allow the instrument into evidence.[7] A properly acknowledged conveyance, on the other hand, is both admissible in evidence[8] and entitled to a relatively strong presumption of genuineness.[9]

The National Conference of Commissioners on Uniform State Laws[10] has concluded that no persuasive reasons exist for attaching so much significance to the ritual of acknowledgment.[11] The Conference recently completed a major reworking of the American law of real property transfers and proposed two[12] uniform acts, one of which—the Uniform Simplification of Land Transfers Act (USLTA)—virtually would eliminate the necessity of an acknowledgment or kindred formality in American conveyancing.[13] Under

7. See notes 99-114 & accompanying text *infra*.

8. See notes 107-11 & accompanying text *infra*.

9. See notes 115-19 & accompanying text *infra*.

10. The National Conference is composed of commissioners from each state, the District of Columbia, and Puerto Rico. The first National Conference was held in 1892. Its object is to promote uniformity of state laws in areas where uniformity would be desirable and practicable. The National Conference drafts uniform statutes in such areas and recommends them for adoption by the states. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 955-56 (1974).

11. *See* UNIFORM SIMPLIFICATION OF LAND TRANSFERS ACT (USLTA), Prefatory Note (amended 1977).

12. The National Conference approved the Uniform Land Transactions Act (ULTA) in 1975 and the USLTA in 1976. Amendments were adopted in 1977. The Commissioners' original plan had been "to produce a single comprehensive code regulating land transactions, much as the Uniform Commercial Code regulates commercial transactions." Maggs, *Remedies for Breach of Contract Under Article Two of the Uniform Land Transactions Act*, 11 GA. L. REV. 275, 275 (1977). In 1975, however, the commissioners chose to divide the reform effort into several separate acts. *Id.* Despite this division of effort, both the ULTA and the USLTA borrow structure and principles from the Uniform Commercial Code. *See* ULTA, Commissioners' Prefatory Note. *See, e.g.*, USLTA § 1-103, Comment; USLTA, Historical Note (amended 1977).

The ULTA deals with contractual transfers of real estate. *See generally* Kratovil, *The Uniform Land Transactions Act: A First Look*, 49 ST. JOHN'S L. REV. 460 (1975); *Summary of the Uniform Land Transactions Act*, 13 REAL PROP. PROB. & TR. J. 672 (1978) (report of special American Bar Association Committee). The USLTA includes comprehensive provisions governing conveyancing, recording, priorities, and liens. *See generally* Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL. PROP. PROB. & TR. J. 696 (1978); Comment, *The Uniform Simplification of Land Transfers Act: Areas of Departure from State Law*, 73 NW. U.L. REV. 359 (1978).

13. The deemphasis of transactional formality appears in other uniform laws, notably the Uniform Commercial Code (UCC) and the Uniform Probate Code (UPC). Article Nine of the UCC, which governs secured transactions, worked a dramatic simplification of the

the USLTA, a signed conveyance, without other formality, is valid between the parties,[14] is fully recordable,[15] and, when recorded, is entitled to a strong presumption of genuineness.[16]

This Article examines the present structure of American conveyancing law and analyzes the effect that the adoption of the USLTA would have on the existing law of real property transfers.[17] The Article next criticizes the justifications advanced for retaining the formalities of the existing rules. The Article concludes that the USLTA offers needed reform in the existing law of conveyancing and should be adopted by the states.

Elements of American Conveyancing Formality

By the time English settlers began arriving in the New World, the English system of conveyancing had become quite complex, forcing the growth of a class of professional conveyancers distinct from other legal practitioners.[18] For the most part, American colonists left behind the complicated English rules:

> From a very early period of their settlement the colonies adopted an almost uniform mode of conveyance of land, at once simple and practicable and safe. The differences are so slight, that they became almost evanescent. All lands were conveyed by a deed,

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formality and formalism which had plagued that branch of commercial law. *See* Gilmore, *Security Law, Formalism and Article 9*, 47 NEB. L. REV. 659, 661, 675 (1968). The UPC reduces to a minimum the formalities required for execution of a witnessed will. UPC § 2-502, Comment. The will execution requirements under the UPC still are more elaborate than the conveyancing requirements mandated by the USLTA, but greater emphasis on formality always has been thought necessary for the execution of a will. See notes 97-128 & accompanying text *infra*.

14. See text accompanying note 54 *infra*.

15. See text accompanying note 95 *infra*.

16. See text accompanying notes 120-22 *infra*.

17. No state has yet adopted either of the conveyancing acts proposed by the Commissioners, and the USLTA provisions that eliminate some of the existing formalities were questioned strongly by some members of the American Bar Association (ABA) Committee that studied the act. The committee members defended conveyancing formality as a guard against fraud. "It was argued by analogy that even the transfer of a simple corporate stock certificate requires some guaranty of the signature." Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP. PROB. & TR. J. 672, 701 (1978). The drafters responded that the troubles caused by the acknowledgment requirement and kindred imposed formality "tremendously outweigh" the supposed benefits of such devices to prevent fraud. *Id.* The contention that formality prevents fraud is examined in greater detail later in this Article. Both the ULTA and USLTA now have been approved by the ABA. *Id.* at 696 nn.1-2.

18. 7 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 384-85 (2d ed. 1937).

> commonly in the form of a feoffment, or a bargain and sale, or a lease and release, attested by one or more witnesses, acknowledged or proved before some court or magistrate, and then registered in some public registry. When so executed, acknowledged, and recorded, they had full effect to convey the estate without any livery of seisin, or any other act or ceremony whatsoever.[19]

The unavailability of legal expertise and the frequency with which land changed hands prevented the English system from being easily transplanted to the colonies.[20] Cumbersome formalities that were tolerable in England, where land transfers were important to the conservation of family wealth and power, were ill-suited to the colonies where land functioned more as a commodity in an open market.[21] Perhaps a lingering perception that the American conveyancing process was streamlined in comparison with its English ancestor partly explains the long interval during which the American law of land transfers has remained substantially unaltered, despite persistent evidence that some changes would be beneficial.

Every state's conveyancing rules give significance to some formal device beyond the familiar requirement of a signed writing, imposed by a statute of frauds. One or more of three related species of formality may be important: acknowledgment, proof by subscribing witnesses, and attestation. A transferor acknowledges execution of a conveyance by appearing before a statutorily prescribed official, usually a notary public,[22] and by avowing that he or she has freely executed the instrument. The official appends a certificate[23] to the conveyance reciting that the transferor in fact appeared and made the required statement.[24] Proof by subscribing

19. 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 174 (Boston 1833).

20. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 54-55 (1973).

21. *Id.* at 55.

22. *E.g.*, CAL. CIV. CODE §§ 1180-1181 (West Supp. 1980) (acknowledgment within state may be made before justice or clerk of supreme court or court of appeals, judge of superior court, notary public, clerk of municipal or justice court, county recorder, county clerk, court commissioner, judge of municipal or justice court, district attorney, clerk of board of supervisors, city clerk, county counsel, or city attorney); MASS. GEN. LAWS ANN. ch. 183, § 30 (West 1977) (acknowledgment within commonwealth may be made before justice of peace or notary public).

23. For one state's determination of what constitutes a legally sufficient certificate of acknowledgment, see ILL. ANN. STAT. ch. 30, § 25 (Smith-Hurd 1969). *See also* Uniform Acknowledgment Act § 7 (forms); Uniform Recognition of Acknowledgments Act §§ 3-6 (forms and definitions).

24. The term "acknowledgment" may refer both to the transferor's statement to the officer and to the officer's certificate. *See, e.g.*, Jackson v. Hudspeth, 208 Ark. 55, 184 S.W.2d

witnesses is similar to an acknowledgment, but the witnesses to the execution of the conveyance, not the transferor, appear before the notary or other official and state that they witnessed the transferor's execution of the instrument. The official then affixes a certificate[25] to the conveyance similar to the certificate of acknowledgment. Attestation does not involve an official; after witnessing the transferor's execution of the document, the witnesses merely sign an attestation clause indicating their participation.[26]

The consequences of failure to comply with conveyancing formalities[27] vary among the states. In some states, noncompliance affects the validity of the instrument between the original parties. More typically, noncompliance affects the rights of the transferee against third persons.

Validity Between the Parties

The Current Law

An Arkansas statute states that "instruments . . . for the conveyancing of real estate . . . shall be executed in the presence of two [2] disinterested witnesses, or in default thereof shall be acknowledged by the grantor in the presence of two [2] such witnesses . . . ."[28] The Georgia Code provides that "[a] deed to lands must be . . . attested by at least two witnesses . . . ."[29] An Indiana statute states that "[c]onveyances of land . . . shall be by deed in writing, subscribed, sealed and duly acknowledged by the grantor . . . ."[30] Although none of the three statutes specifies any consequences resulting from a failure to utilize the prescribed formality, courts in these states have held that instruments lacking the apparently mandatory formality nevertheless are valid between the

906 (1945).

25. For one state's determination of what constitutes a legally sufficient certificate of subscribing witnesses, see ALA. CODE § 35-4-30 (1975).

26. *See* 3 AMERICAN LAW OF PROPERTY § 12.59 (A. Casner ed. 1952).

27. Formality is a lesser aspect of formalism. Formalism requires *strict* compliance with prescribed formality. Formalism characterizes current judicial treatment of wills act formality. *See* Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975). Courts, however, generally hold that substantial compliance with conveyancing formality is sufficient. *See, e.g.*, Edenfield v. Wingard, 89 So. 2d 776 (Fla. 1956); Hatcher v. Hall, 292 S.W.2d 619 (Mo. App. 1956).

28. ARK. STAT. ANN. § 50-417 (1971).

29. GA. CODE ANN. § 29-101 (1969).

30. IND. CODE ANN. § 32-1-2-4 (Burns 1973).

parties.[31]

The opinions holding that a conveyance lacking the prescribed formality is valid between the parties to the transaction often reason that the statutorily prescribed formality adds nothing to the instrument's validity as a conveyance between the parties,[32] but is necessary only for proper recordation of the instrument.[33] These decisions are in accord with the rule adopted in the vast majority

31. McSwain v. Criswell, 213 Ark. 775, 213 S.W.2d 383 (1948) (unacknowledged deed is good between parties); Jackson v. Allen, 30 Ark. 110 (1875) (unattested or unacknowledged deed confers equitable title under which grantee is entitled to hold possession); Allgood v. Allgood, 230 Ga. 312, 196 S.E.2d 888 (1973) (attestation affects only recordability); Budget Charge Accounts, Inc. v. Peters, 213 Ga. 17, 96 S.E.2d 887 (1957) (deed without attestation conveys title against grantor and heirs); Cypress Creek Coal Co. v. Boonville Mining Co., 194 Ind. 187, 142 N.E. 645 (1924) (void acknowledgment does not affect validity of instrument between parties or as to parties with actual notice); Bever v. North, 107 Ind. 544, 8 N.E. 576 (1886) (acknowledgment essential for recording, but not essential to give effect between parties).

These judicial responses are echoed in other jurisdictions. *Compare* ME. REV. STAT. ANN. tit. 33, § 151 (1978) (person may convey by deed to be acknowledged and recorded as provided) *with* Gibson v. Norway Sav. Bank, 69 Me. 579 (1879) (object of acknowledgment is to entitle deed to be registered; estate passes to grantee even absent acknowledgment); *compare* MICH. COMP. LAWS ANN. § 565.1 (1967) (conveyances may be made by acknowledged deed or by proved and recorded deed) *and id.* § 565.8 (deeds shall be executed in presence of two witnesses) *with* Turner v. Peoples State Bank, 299 Mich. 438, 300 N.W. 353 (1941) (acknowledgment has no effect on validity of conveyance between parties, its purpose being to admit deed to record); Kerschensteiner v. Northern Mich. Land Co., 244 Mich. 403, 221 N.W. 322 (1928) (unwitnessed deed good between parties but should be witnessed in order to be recorded); *and* Brown v. McCormick, 28 Mich. 215 (1873) (acknowledgment is not constituent part of conveyance, and deed lacking acknowledgment will prove transfer of title between parties and against those chargeable with notice); *compare* MO. ANN. STAT. § 442.020 (Vernon 1952) (conveyance may be made by deed executed, acknowledged, and recorded without any other act or ceremony whatsoever) *and id.* § 442.130 (conveyances shall be acknowledged or proved) *with* Elsea v. Smith, 273 Mo. 396, 202 S.W. 1071 (1918) (title vests in grantee without acknowledgment as if formalities of statute had been complied with because purpose of section is to protect creditors and subsequent purchasers); *compare* NEB. REV. STAT. § 76-211 (1976) (deed must be signed, acknowledged or proved, and recorded) *and id.* § 76-216 (Supp. 1978) (grantor must acknowledge instrument) *with* Grand Island Hotel Corp. v. Second Island Dev. Co., 191 Neb. 98, 214 N.W.2d 253 (1974) (unacknowledged instrument good between parties) *and* Martin v. Martin, 76 Neb. 335, 107 N.W. 580 (1906) (acknowledgment goes to the right to have deed recorded and is not essential to validity); *compare* NEV. REV. STAT. § 111.240 (1979) (every conveyance shall be acknowledged or proved and certified) *with* Allen v. Hernon, 74 Nev. 238, 328 P.2d 301 (1958) (no statute voids deed as between parties for failure of acknowledgment); *compare* OR. REV. STAT. § 93.010 (1977) (conveyance may be made by deed signed, acknowledged, and recorded) *with* Houck v. Darling, 238 Or. 484, 395 P.2d 445 (1964) (acknowledgment not essential to validity of deed between parties).

32. *E.g.*, Bever v. North, 107 Ind. 544, 8 N.E. 576 (1886); Gibson v. Norway Sav. Bank, 69 Me. 579 (1879).

33. *E.g.*, Allgood v. Allgood, 230 Ga. 312, 196 S.E.2d 888 (1973).

of American jurisdictions that a conveyance is valid between the parties although unacknowledged, unproved, and unwitnessed.[34] In many states, the legislation that sets forth the requirements for a conveyance makes no reference to any formality beyond a signed writing,[35] and in at least three states, statutes provide that conveyances are valid between the parties despite noncompliance with statutory formality.[36]

34. *See* Kimbro v. Kimbro, 199 Cal. 344, 249 P. 180 (1926) (conveyance valid between parties without acknowledgment); American Nat'l Bank v. Silverthorn, 87 Colo. 345, 287 P. 641 (1930) (conveyance valid between parties without acknowledgment in absence of statute); Chun Chew Pang v. Chun Chew Kee, 49 Haw. 62, 412 P.2d 326 (1966) (deed valid between parties without acknowledgment); Mollendorf v. Derry, 95 Idaho 1, 501 P.2d 199 (1972) (acknowledgment not required except for purpose of recording); Zilvitis v. Szczudlo, 409 Ill. 252, 99 N.E.2d 124 (1951) (deed passes title without acknowledgment); Shanda v. Clutier State Bank, 220 Iowa 290, 260 N.W. 841 (1935) (assuming acknowledgment defective, validity between parties not affected); Tawney v. Blankenship, 150 Kan. 41, 90 P.2d 1111 (1939) (acknowledgment has reference only to proof of execution and not to force of instrument between parties); Blankenship v. Green, 283 Ky. 700, 143 S.W.2d 294 (1940) (unacknowledged deed good between parties and conveys title to grantee); Jacobs v. Jacobs, 321 Mass. 350, 73 N.E.2d 477 (1947) (acknowledgment not necessary for validity of deed between parties); Brown v. Reinke, 159 Minn. 458, 199 N.W. 235 (1924) (acknowledgment of instrument not necessary for validity); Kelly v. Wilson, 204 Miss. 56, 36 So. 2d 817 (1948) (defectively acknowledged deed good between parties); Taylor v. Holter, 1 Mont. 688 (1872) (acknowledgment not essential for validity of deed between parties); Hastings v. Cutler, 24 N.H. 481 (1852) (as to grantor and heirs, deed sufficient to convey estate under statute of uses without any witnesses); Kitchen v. Canavan, 36 N.M. 273, 13 P.2d 877 (1932) (acknowledgment not essential to validity of conveyance between parties); Strough v. Wilder, 119 N.Y. 530, 23 N.E. 1057 (1890) ("well settled that . . . title under [un]acknowledged and unattested deed . . . is good as between the parties"); Watson v. Kresse, 130 N.W.2d 602 (N.D. 1964) (unless homestead of married person involved, transfer of estate need not be acknowledged or witnessed to be valid); Citizens Nat'l Bank v. Denison, 165 Ohio St. 89, 133 N.E.2d 329 (1956) (defectively executed conveyance of interest in land is valid between parties in absence of fraud); Stovall v. Liberty Plan of America, Inc., 414 P.2d 242 (Okla. 1966) (effective acknowledgment not necessary to make mortgage binding between parties); Banbury v. Sherin, 4 S.D. 88, 55 N.W. 723 (1893) (deed operative to pass title although defective acknowledgment certificate); Haile v. Holtzclaw, 414 S.W.2d 916 (Tex. 1967) (deed valid between grantor and grantee without valid acknowledgment); Peatross v. Gray, 181 Va. 847, 27 S.E.2d 203 (1943) (acknowledgment necessary for recordation but not to convey title).

35. *See* CAL. CIV. CODE § 1091 (West 1954); IDAHO CODE § 55-601 (1979); ILL. ANN. STAT. ch. 30, § 1 (Smith-Hurd Supp. 1979); MASS. GEN. LAWS ANN. ch. 183, § 1 (West 1977); MISS. CODE ANN. § 89-1-1 (1972); MONT. CODE ANN. § 70-20-101 (1979); N.D. CENT. CODE § 47-10-01 (1978); S.D. COMP. LAWS ANN. § 43-25-1 (1967); TEX. REV. CIV. STAT. ANN. art. 1288 (Vernon 1980).

36. *See* R.I. GEN. LAWS § 34-11-1 (Supp. 1979) (unacknowledged and unrecorded conveyance, if delivered, valid and binding as between parties and heirs, and as against those taking by gift or devise or those having notice thereof); UTAH CODE ANN. § 57-1-6 (1974) (instruments valid between parties and as to all who have actual notice without acknowledgment); WIS. STAT. ANN. § 706.02 (West Special Pamphlet 1980) (no acknowledgment required for validity of conveyance). *Cf.* N.M. STAT. ANN. § 14-13-12 (1978) (acknowledgment

Some states have recognized the equitable validity of instruments lacking the requisite formality, thus distinguishing between legal and equitable property interests on the basis of the presence of formalities such as attestation or acknowledgment. In Alabama, for example, a conveyance either must be attested by at least one witness[37] or must be acknowledged.[38] The Alabama courts have interpreted this statutory mandate to mean that an unattested and unacknowledged conveyance cannot pass a legal interest in the real estate. The same cases, however, also state that such a conveyance can create an interest in the transferee, enforceable in equity, as an agreement to convey the legal interest.[39] Arizona[40] and Connecticut[41] have enacted statutes expressly providing for the equitable validity of instruments lacking the requisite formalities. Courts in Maryland[42] and Vermont[43] also have given limited recognition to the concept of equitable validity.[44] In some states, cases hold that

not necessary to execution unless expressly so provided by statute). See note 45 & accompanying text *infra; cf.* notes 37-44 & accompanying text *infra* (equitable validity).

37. "Conveyances for the alienation of lands must be written or printed, or partly written and partly printed, on parchment or paper, and must be signed at their foot by the contracting party or his agent having a written authority; or, if he is not able to sign his name, then his name must be written for him, with the words "his mark" written against the same, or over it; *the execution of such conveyance must be attested by one witness* or, where the party cannot write, by two witnesses who are able to write and who must write their names as witnesses; or, if he can write his name but does not do so and his name is written for him by another, then the execution must be attested by two witnesses who can and do write their names." ALA. CODE § 35-4-20 (1975) (emphasis added).

38. "The acknowledgement provided for, in this article operates as a compliance with the requisitions [sic] of section 35-4-20 upon the subject of witnesses." *Id.* § 35-4-23.

39. *E.g.*, Lavender v. Ball, 267 Ala. 104, 100 So. 2d 331 (1958); Golden v. Golden, 256 Ala. 187, 54 So. 2d 460 (1951); Niehuss v. Ford, 251 Ala. 529, 38 So. 2d 484 (1949); Lowery v. May, 213 Ala. 66, 104 So. 5 (1925); Sparks v. Woodstock Iron & Steel Co., 87 Ala. 294, 6 So. 195 (1888).

40. ARIZ. REV. STAT. ANN. § 33-437 (1974) (instrument in writing and intended as conveyance that fails to take effect as conveyance because of statutory provisions is valid as contract upon which conveyance may be enforced as far as rules of law permit). *See* Murphy v. Brown, 12 Ariz. 268, 100 P. 801 (1909); Heller v. Levine, 7 Ariz. App. 231, 437 P.2d 983 (1968); Keck v. Brookfield, 2 Ariz. App. 424, 409 P.2d 583 (1966).

41. CONN. GEN. STAT. ANN. § 47-17 (West 1978) (unacknowledged deed may operate as conveyance of equitable interest).

42. Adams v. Avirett, 252 Md. 566, 250 A.2d 891 (1969) (deed of trust with void acknowledgment may be enforced in equity as between the parties).

43. Vermont Accident Ins. Co. v. Fletcher, 87 Vt. 394, 89 A. 480 (1914) (equity may treat unwitnessed deed as evidence, although not conclusive, of an agreement to execute deed).

44. "But it is urged that the deed is good in equity and would be enforced in a court of chancery; and that the existence of an equitable incumbrance is a sufficient breach to sustain this action. But it can not be affirmed that any equitable incumbrance was ever created

informal conveyances are valid between the parties, but the opinions leave some doubt whether the result is based solely on the notion of equitable validity.[45]

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by the deed, or that it is operative or would be enforced; especially after the death of the grantor, and after the title to the land has passed to a subsequent purchaser who may be a *bona fide* purchaser without notice. The recording of such defective deed is not constructive notice to subsequent purchasers. It is true that in a court of equity the execution of such a deed is treated as evidence of an agreement to execute a valid deed, but not conclusive. The relief that chancery affords in such case is in the nature of a decree for a specific performance, but it is not a matter of course that relief is granted. It depends on too many contingencies for a court of law to treat the deed as valid upon the assumption that a court of equity would enforce it on application for that purpose. To do so would in effect be to hold the deed valid at law, and dispense with the aid of a court of equity in such cases." Day v. Adams, 42 Vt. 510, 515-16 (1869).

Although the Maryland courts long have recognized that unacknowledged instruments intended as legal mortgages or deeds of trust could be given effect in equity, *see* Price v. McDonald, 1 Md. 403 (1851), there is also authority in Maryland that an unacknowledged gift of an interest in land will not be enforced in equity, *see* Berman v. Berman, 193 Md. 614, 69 A.2d 271 (1949). The difference between *Berman* and the Maryland mortgage cases seems to be that the *Berman* court was unable to find any consideration to support the unacknowledged instrument. Thus, the Maryland authority underscores the point made by the Vermont court that the source of equitable validity of a conveyance may be equity's willingness to view the defectively formalized instrument as a specifically enforceable contract for which consideration must be present.

45. An early South Carolina case, Farmers' Bank & Trust Co. v. Fudge, 113 S.C. 25, 100 S.E. 628 (1919), gave conflicting signals about the source of validity of an unwitnessed mortgage, adverting both to equitable validity and to the notion that a mortgage will not be void between the parties unless a statute specifically mandates such invalidity as a consequence of failure to comply with statutory formality: "[T]he mortgage, even without witnesses, would have been good between the parties; and the fact that the witnesses may be disqualified by interest would not have the effect of destroying its validity. A mortgage attested by witnesses, who are incompetent by reason of interest, stands upon the same footing as if it were without witnesses. . . .

"It was also held in Harper v. Barsh, [31 S.C. Eq. (10 Rich. Eq. 149 (1858))] that a mortgage with a single subscribing witness is void as a legal mortgage, but could be enforced in equity. The effect of the defective execution of a will is quite different from that of a mortgage. Section 3564 of the Code of Laws provides that wills shall be attested, in the presence of three or more credible witnesses, 'or else they shall be utterly void and of none effect,' while section 3453 provides that in order for a deed to be valid and effectual to carry the fee simple, it shall be executed in the presence of two or more credible witnesses. There are, however, no such words in section 3453 as 'or else they shall be utterly void and of none effect.' The mere disqualification of a witness does not render a mortgage void, but there must be a provision of law to that effect." 113 S.C. at 36-37, 100 S.E. at 632. The *Fudge* case was cited in Smith v. Hawkins, 254 S.C. 423, 175 S.E.2d 824 (1970), *cert. denied*, 400 U.S. 999 (1971), for the proposition that a deed without witnesses is valid between the parties, but *Smith* did not distinguish between equitable and legal validity.

Ambivalence about the concept of equitable validity also is present in Alaska, *see* Smalley v. Juneau Clinic Bldg. Corp., 493 P.2d 1296, 1300 n.11 (Alaska 1972) (court noting distinction in earlier decision between legal and equitable validity but declining to speak to the question of the continuing significance of the distinction); New Jersey, *compare* Holloway v.

The jurisdiction perhaps most hostile to the idea that a deed is valid between the parties despite its failure to comply with prescribed formality is Florida. The Florida statute provides that "[n]o estate or interest of freehold, or for a term of more than one year . . . shall be . . . transferred . . . in any other manner than by instrument in writing, signed in the presence of two subscribing witnesses . . . ."[46] The Florida courts have limited the effect of the statute by holding that it does not apply to contracts for the sale of land, even though such contracts may be specifically enforced,[47] or to mortgages.[48] At least one Florida court has held that a deed lacking witnesses may take effect as a mortgage.[49] When the statute does operate, however, it deprives a deed of validity equitably as well as legally. In *Santos v. Bogh*,[50] the defendant argued that a deed signed by only one witness should be regarded as a contract creating an equitable interest in the grantee. The court agreed that a real estate *contract* without witnesses could be specifically enforced, but it declined to apply that rule to an instrument which plainly was not a contract but a deed.[51] Perhaps the *Santos* result would have been different if the deed's proponent had introduced evidence that the quitclaim deed was supported by consideration,[52] but the language of the opinion suggests that Florida courts will deny validity to an unwitnessed instrument styled as a deed unless

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Hendrick, 98 N.J. Eq. 713, 129 A. 702 (1925) (distinction between legal and equitable validity not discussed in holding that unacknowledged instruments are good between parties) *with* N.J. STAT. ANN. § 46:4-11 (West 1940) (deed which shall fail to take effect because of noncompliance with statutory formality shall nevertheless be valid and effectual, and shall bind parties so far as rules of law and equity permit, as if statutory formality was not required); Washington, *compare* Anderson v. Thursday, Inc., 76 Wash. 2d 54, 455 P.2d 932 (1969) (distinction between legal and equitable validity not discussed in holding unacknowledged deed good between parties) *with* Edson v. Knox, 8 Wash. 642, 36 P. 698 (1894) (unacknowledged deed, even if maintainable as deed, certainly can be maintained as a contract for a deed conveying equitable title); and Wyoming, *compare* Ohio Oil Co. v. Wyoming Agency, 63 Wyo. 187, 179 P.2d 773 (1947) (no mention of a distinction between equitable and legal validity in holding that absence of formality does not prevent passing of title) *with* Conradt v. Lepper, 13 Wyo. 473, 81 P. 307 (1905) (unwitnessed mortgage is "at least" an equitable mortgage).

46. FLA. STAT. ANN. § 689.01 (West 1969).

47. *See* Carroll v. Dougherty, 355 So. 2d 843 (Fla. Dist. Ct. App. 1978).

48. *See* Wickes Corp. v. Moxley, 342 So. 2d 839 (Fla. Dist. Ct. App. 1977), *aff'd*, 356 So. 2d 785 (Fla. 1978).

49. *See* Walker v. City of Jacksonville, 360 So. 2d 52 (Fla. Dist. Ct. App. 1978).

50. 334 So. 2d 833 (Fla. Dist. Ct. App. 1976).

51. *Id.* at 834.

52. See note 44 *supra*.

the claim specifically asserts that the instrument be treated as a mortgage.[53]

The USLTA

The USLTA simply abolishes formal requirements as a prerequisite to a valid conveyance. Section 2-201(c) of the USLTA states that "[a] conveyance does not require an acknowledgment, seal, or witness."[54] The drafters recognized that "[m]ost states have never required an acknowledgment for the effectiveness of a conveyance."[55]

Validity Against Third Persons

The Current Law

In most states, statutes prescribing the operation of the official real estate records condition the valid recording of a conveyance upon the instrument's compliance with prescribed formality. The statutes commonly provide that, to be recordable, an instrument either must be acknowledged by the transferor or must be proved by subscribing witnesses.[56] The recording statutes also make ex-

53. See note 49 & accompanying text *supra*. In contrast to the rigor of the *Santos* decision is the willingness of the Florida courts sometimes to salvage transactions involving noncomplying instruments by invoking estoppel concepts. *See, e.g.*, Gill v. Livingston, 158 Fla. 577, 29 So. 2d 631 (1947); Bodden v. Carbonell, 354 So. 2d 927 (Fla. Dist. Ct. App. 1978).

54. USLTA § 2-201(c).

55. *Id.* § 2-201, Comment 3.

56. *See* ALASKA STAT. § 34.14.260(a) (1975); ARK. STAT. ANN. § 49-211 (1971); CAL. GOV'T CODE § 27287 (West 1968); DEL. CODE ANN. tit. 25, § 151 (1974); FLA. STAT. ANN. § 695.03 (West Supp. 1979); HAWAII REV. STAT. § 502-81 (1976); IDAHO CODE § 55-805 (1979); IND. CODE ANN. § 32-1-2-18 (Burns 1973); IOWA CODE ANN. § 558.42 (West Supp. 1979); KAN. STAT. ANN. § 58-2221 (1976); KY. REV. STAT. ANN. § 382.080 (Baldwin 1979); ME. REV. STAT. ANN. tit. 33, §§ 203, 306 (1964 & Supp. 1979); MASS. GEN. LAWS ANN. ch. 183, § 29 (West 1977); MISS. CODE ANN. § 89-3-1 (1975); MO. CODE ANN. § 442.380 (Vernon 1949); MONT. CODE ANN. § 70-21-203 (1979); NEB. REV. STAT. § 76-235 (1976); NEV. REV. STAT. § 111.310 (1973); N.J. STAT. ANN. § 46:15-1 (West 1940); N.J. CENT. CODE § 47-19-03 (1978); N.Y. REAL PROP. LAWS § 291 (McKinney 1968); OKLA. STAT. ANN. tit. 16, §§ 15-16 (West 1951); OR. REV. STAT. § 93.480 (1979); PA. STAT. ANN. tit. 21, §§ 42, 444 (Purdon 1955); S.C. CODE § 30-5-30 (1976); S.D. COMP. LAWS ANN. § 43-28-8 (1967); TENN. CODE ANN. § 64-2201 (1976); TEX. REV. CIV. STAT. ANN. art. 6626 (Vernon Supp. 1979); UTAH CODE ANN. § 57-3-1 (1974); VA. CODE § 55-106 (1974); WYO. STAT. § 34-1-118 (1977).

The recording statutes of a few states omit the proof-by-witnesses alternative. *See* ARIZ. REV. STAT. ANN. § 33-411(B) (1974); MD. REAL PROP. CODE ANN. § 4-101 (Supp. 1979); N.M. STAT. ANN. § 14-8-4 (1978); R.I. GEN. LAWS § 34-11-1 (Supp. 1979).

In several other states different formal prerequisites for recording are specified. The

plicit,[57] or have been interpreted to mean,[58] that a conveyance

Georgia rules, for example, are quite muddled. GA. CODE ANN. § 29-405 (1969) authorizes the valid recording of instruments that have been attested or acknowledged "as hereinafter provided," but the section also states that "nothing herein shall dispense with another witness where an additional witness is required." The caveat about the additional witness apparently refers to GA. CODE ANN. § 29-101 (1969), which provides that a deed to lands must be "attested by at least two witnesses." In Allgood v. Allgood, 230 Ga. 312, 196 S.E.2d 888 (1976), the court held that attestation affects only recordability, so § 29-101 must be viewed as a provision designating the number of witnesses necessary for valid recordation, although curiously it is completely separate from the recording provisions. When § 29-405 speaks of attestation or acknowledgment "as hereinafter provided," however, it does not seem to refer to § 29-101, which comes before, not after § 29-405. The "hereinafter" phrase of the section therefore must refer to GA. CODE ANN. § 29-406 (1969), which permits certain officers, including a notary public, to attest instruments, and to GA. CODE ANN. § 29-408 (1969), which authorizes recordation of instruments acknowledged before officers specified in § 29-406. *See also* GA. CODE ANN. § 29-410 (1969) (allowing form of proof by subscribing witnesses). The aggregate meaning of the provisions seems to be that all instruments must be attested by two witnesses to be recordable; moreover, instruments must be either attested by or acknowledged in the presence of an officer designated in § 29-406, or proved in the manner set out in § 29-410. A deed with two witnesses, neither of whom is a § 29-410 officer, which also is acknowledged before such an officer, can be recorded. A deed with two attesting witnesses, one of whom is an officer designated in § 29-410, also can be recorded. A deed that is acknowledged but not attested is not recordable because § 29-101, requiring two witnesses, has not been complied with, and even a deed with an acknowledgment plus one witness lacks the proper formality for recordation. *See* White & Co. v. Magarahan, 87 Ga. 217, 13 S.E. 509 (1891). *See generally* G. PINDAR, GEORGIA REAL ESTATE LAW AND PROCEDURE §§ 19-56, -60 (1971).

Other statutes prescribing recordation formality different from the usual acknowledge-or-proof model include N.H. REV. STAT. ANN. § 477:7 (1968) (attestation and acknowledgment); OHIO REV. CODE ANN. § 5301.01 (Page 1970) (acknowledgment in presence of two attesting witnesses, who shall attest by signing and subscribe names to attestation); and VT. STAT. ANN. §§ 341-342 (1975) (attestation by two witnesses plus acknowledgment).

Finally, in a number of states if neither acknowledgment nor proof by subscribing witnesses is possible, other kinds of proof will suffice to allow recordation of an instrument. *E.g.*, CAL. CIV. CODE §§ 1198-1204 (West 1954) (execution established by proof of handwriting of party and of subscribing witness); S.D. CODIFIED LAWS ANN. § 18-4-19, -20 (1979) (same).

57. MISS. CODE ANN. § 89-3-1 (1972) (instrument shall not be admitted to record unless execution acknowledged or proved, and instrument admitted without acknowledgment or proof "shall not be notice to creditors or subsequent purchasers for valuable consideration"); N.M. STAT. ANN. § 14-8-4 (instrument not "acknowledged and certified may not be filed and recorded, nor considered of record, though so entered"); OKLA. STAT. ANN. tit. 16, § 26 (West 1951) (no instrument shall be recorded unless acknowledged; recording of unacknowledged instrument "shall not be effective for any purpose").

58. Smalley v. Juneau Clinic Bldg. Corp., 493 P.2d 1296 (Alaska 1972) (noting the purposes of acknowledgment, "to allow an instrument to be recorded or to be introduced into evidence without further proof of execution"); Reid v. Kleyensteuber, 7 Ariz. 58, 60 P. 879 (1900); Wyatt v. Miller, 255 Ark. 304, 500 S.W.2d 590 (1973); Henrici v. South Feather Land & Water Co., 177 Cal. 442, 170 P. 1135 (1918); Lassiter v. Curtiss-Bright Co., 129 Fla. 628, 177 So. 201 (1937); Gardner v. Granniss, 57 Ga. 539 (1876); Matheson v. Harris, 98 Idaho 758, 572 P.2d 861 (1977); Bledsoe v. Ross, 59 Ind. App. 609, 109 N.E. 53 (1915);

lacking the proper formality, although physically placed in the records, has no status as a record[59] and therefore gives no constructive notice of the transaction from which it arose.[60]

If a physically recorded instrument lacking proper formality does not give constructive notice, the instrument's validity as against certain categories of third persons is seriously jeopardized. At common law, the general rule was that the property interest created first had priority; when the transferor purported to convey a later interest, he or she had nothing left to convey.[61] Most American recording statutes, however, operate to protect subsequent purchasers who take without notice of an earlier transaction.[62] Thus, it is in a transferee's interest to make sure no later purchasers can take without notice. The easiest way to ensure this result is to record the conveyance because a validly recorded conveyance gives a kind of constructive notice that is usually referred to as record notice.[63] Whether a subsequent transferee actually looks in the real estate records is immaterial; he or she is held to have notice merely because the conveyance is recorded.[64] Inasmuch as a physically recorded instrument lacking prescribed formality is denied effect as constructive notice, a subsequent purchaser will take free of the earlier interest unless it can be established that the purchaser acquired notice in some other way.[65]

Dussaume v. Burnett, 5 Iowa 95 (1857); Nordman v. Rau, 86 Kan. 19, 119 P. 351 (1911); Ferrell v. Childress, 172 Ky. 760, 189 S.W. 1149 (1916); DeWitt v. Loulton, 17 Me. 418 (1840); Graves v. Graves, 72 Mass. 391 (1856); Hatcher v. Hall, 292 S.W.2d 619 (Mo. App. 1956); Mulligan v. Snavely, 117 Neb. 765, 223 N.W. 8 (1929); Hastings v. Cutler, 24 N.H. 481 (1852); New Jersey Bank v. Azco Realty Co., 148 N.J. Super. 159, 372 A.2d 356 (1977); Vorenburg v. Bosserman, 17 N.M. 433, 130 P. 438 (1913); High v. Davis, 283 Or. 315, 584 P.2d 725 (1978); McKean & Elk Land Improvement Co. v. Mitchell, 35 Pa. 269 (1860); Banbury v. Sherin, 4 S.D. 88, 55 N.W. 723 (1893); Childers v. William H. Coleman Co., 122 Tenn. 109, 118 S.W. 1018 (1909); Tandy v. Dickinson, 371 S.W.2d 81 (Tex. Civ. App. 1963); Norton v. Fuller, 68 Utah 524, 251 P. 29 (1926); Pope v. Henry, 24 Vt. 560 (1852); Hunton v. Wood, 101 Va. 54, 43 S.E. 186 (1903); Abney v. Ohio Lumber & Mining Co., 45 W. Va. 446, 32 S.E. 256 (1898); Thomas v. Roth, 386 P.2d 926 (Wyo. 1963).

59. 4 AMERICAN LAW OF PROPERTY § 17.31, at 616 (A. Casner ed. 1952).

60. In a few states formal requirements exist for recordation, but noncomplying instruments that actually reach the records are given effect as constructive notice. See notes 93-94 & accompanying text *infra*.

61. J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 279 (2d ed. 1975).

62. *Id.* at 279-80.

63. *Id.* at 289.

64. *Id.*

65. Possession, for example, can constitute inquiry notice. 4 AMERICAN LAW OF PROPERTY § 17.12 (A. Casner ed. 1952).

If a prospective purchaser searches the real estate records and discovers an earlier conveyance lacking the formality required for valid recording, the question arises whether the subsequent purchaser is charged with actual notice of the earlier interest and must take subject to it. Among the jurisdictions that have considered this problem, the nearly unanimous view is that the subsequent purchaser does take subject to the interest created by the nonconforming instrument.[66] In *Hastings v. Cutler*,[67] the New Hampshire Supreme Court stated:

> As the deed in this case was not executed according to the statute, the registration as such is inoperative; that is to say, the registration is not constructive notice of the conveyance. But if by means of that registration of the defective deed, the defendants had actual notice of the plaintiff's title, they are charged with the notice as in other cases. The defendants, when they found the copy of the plaintiff's deed on record, must have understood that the intended record was to give information that such a deed had been made, and that the plaintiff claimed the land under it. This must be regarded as actual notice, such as every reasonable and honest man would feel bound to act upon.[68]

Once a court concludes that discovery of an informal document in the records amounts to actual notice, logically it also must decide how to allocate the evidentiary burdens on the factual question of whether the subsequent transferee did see the record copy of the defectively formalized instrument. Although this problem is rarely discussed in the cases, several approaches to it are conceivable. The court might create a conclusive presumption that the subsequent taker saw the record copy of the earlier conveyance. Such

66. *See* Prince v. Alford, 173 Ark. 633, 293 S.W. 36 (1927); Parkside Realty Co. v. MacDonald, 166 Cal. 426, 137 P. 21 (1913); Lassiter v. Curtiss-Bright Co., 129 Fla. 728, 177 So. 201 (1937); Walters v. Hartwig, 106 Ind. 123, 6 N.E. 5 (1886); Saunders v. King, 119 Iowa 291, 93 N.W. 272 (1903); Woods v. Garnett, 72 Miss. 78, 16 So. 390 (1894); Musick v. Barney, 49 Mo. 458 (1872); Mulligan v. Snavely, 117 Neb. 765, 223 N.W. 8 (1929); High v. Davis, 283 Or. 315, 584 P.2d 725 (1978); Farmers Mut. Royalty Syndicate, Inc. v. Isaaks, 138 S.W.2d 228 (Tex. Civ. App. 1940); Vermont Mining & Quarrying Co. v. Windham County Bank, 44 Vt. 489 (1872). *See also* Gardner v. Granniss, 57 Ga. 539 (1876); Aiau v. Kupau, 4 Haw. 384 (1881); Farm Bureau Fin. Co., Inc. v. Carney, 605 P.2d 509 (Idaho 1980); Ferrell v. Childress, 172 Ky. 760, 189 S.W. 1149 (1916); Baker v. Baker, 90 N.M. 38, 559 P.2d 415 (1977); Rhode Island Hosp. Trust Nat'l Bank v. Boiteau, 376 A.2d 323 (R.I. 1977); Stockton v. Murray, 25 Tenn. App. 371, 157 S.W.2d 859 (1942); Hunton v. Wood, 101 Va. 54, 43 S.E. 186 (1903); Clarksburg Casket Co. v. Valley Undertaking Co., 81 W. Va. 212, 94 S.E. 549 (1917).

67. 24 N.H. 481 (1852).

68. *Id.* at 483.

a conclusive presumption could be defended on the same grounds that might be used to explain the record notice given by a validly recorded conveyance: It is the policy of the recording acts that a prospective transferee make a reasonable title search; therefore, a transferee is charged with notice of whatever a reasonable title search would reveal. The transparent weakness in such a presumption is that it renders impotent the legislatively mandated formal requirements for valid recordation because a conclusive presumption of actual notice would not differ practically from the record notice reserved for validly recorded instruments.[69]

An alternative evidentiary standard would be to create a rebuttable presumption that a subsequent transferee actually saw a prior unacknowledged, unwitnessed conveyance in the records during a title search. This burden would force a transferee who sought to take free of the earlier interest to introduce evidence that the routine title search was not made or was made imprudently with the result that the earlier conveyance was not discovered.[70] The rebuttable presumption alternative, however, uncomfortably rewards the negligent. A careless transferee who convinces a jury of his or her carelessness in conducting a proper title search can take free of the earlier conveyance, but a careful and honest transferee, having found the conveyance, will take subject to it or, more likely, withdraw from the transaction.

A third evidentiary alternative would be to treat the fact of physical recordation as some evidence for the trier of fact on the question of actual notice. The presence of an instrument in the records surely increases the probability that the subsequent trans-

69. *See* Bell v. Sage, 60 Cal. App. 149, 212 P. 404 (1922).

70. *Cf.* Scult v. Bergen Valley Builders, Inc., 76 N.J. Super. 124, 135-36, 183 A.2d 865, 871 (1962), *aff'd,* 82 N.J. Super. 124, 197 A.2d 704 (1964) (discussing inquiry notice from validly recorded materials: "I feel that in the absence of *knowledge* of any kind concerning the property to be purchased it would be inequitable to automatically and unhesitatingly decide that every prospective purchaser is irrebuttably charged with knowledge of the facts contained in the record together with such facts as a reasonable inquiry might uncover. A more equitable solution is to create a rebuttable presumption that a party has searched the record and discovered facts contained therein which put him on inquiry to pursue his search further. When the party against whom the presumption operates introduces evidence which establishes that he did not in fact search the record—as is the inevitable case where a person has only reached the stage of signing a contract to purchase real estate—the presumption disappears and he is chargeable only with notice of the facts contained in the record altogether with such facts as he actually knows. Proof may then be introduced by the opposing party to establish that a search was made.").

feree saw it.[71] Accordingly, most courts probably would not adopt the final possible alternative of counting physical recordation as not admissible at all on the issue of actual notice.

A few states go beyond the constructive notice rules to circumscribe the validity of a defectively formalized deed against third parties. In Kansas, for example, one who sees the physically recorded copy of an unacknowledged deed is not charged with actual notice of the transaction from which the deed arose and therefore may ignore the copy. In *Nordman v. Rau,*[72] Rau gave Nordman a mortgage on his land. A copy of the mortgage instrument was recorded without any acknowledgment. Rau's land subsequently was sold by the sheriff to Webb to satisfy a personal judgment against Rau. The trial court found that Webb's lawyer had discovered the record of the mortgage before bidding on the land for Webb. The Kansas Supreme Court held that Webb took Rau's land free of the Nordman mortgage even though the lawyer's knowledge was fully imputable to Webb:

> One who has seen the record of an unacknowledged instrument is not deemed, because of that fact, to have actual notice of the instrument itself, upon these grounds: To charge him with such notice is to require him to assume, without proof and without competent evidence, that a valid conveyance is in existence corresponding to the unauthorized copy . . . . To charge him with actual notice of the existence of a conveyance, because he has seen a copy of it which, without legal authority, has been written in a book of public records, is essentially to give such copy the force of a valid record. To hold that the record of an unacknowledged conveyance, if known to a prospective buyer, amounts to actual notice of the instrument, is to compel him to give it force as evidence, which the court itself would refuse it.[73]

The court noted, however, that Webb would have been charged with notice of the mortgage if the lawyer had seen not the physically recorded copy, but the unacknowledged mortgage itself.[74] Justice Mason, who delivered the opinion for the majority, also wrote a dissent:

> My own view of the question presented is this: Where a prospective buyer of land sees upon the record what purports to be the copy of an instrument bearing no certificate of acknowledgment

71. *See* Prince v. Alford, 173 Ark. 633, 293 S.W. 36 (1927).
72. 86 Kan. 19, 119 P. 351 (1911).
73. *Id.* at 22, 119 P. at 352-53.
74. *Id.* at 23, 119 P. at 353.

> (or a defective one, for the rule would necessarily be the same), the inference which he would naturally and almost necessarily draw would be that the record was made at the instance of the grantee; and that the grantee claimed to have an interest in the land under an instrument in the language of the copy. The record would not be competent legal evidence that such an instrument had been executed, but it would suggest that probability so strongly that a prudent person having knowledge of it would be put upon inquiry. It would give him a definite and tangible clue which, if diligently followed up, would ordinarily bring the truth of the matter to light. In the present case, if an inquiry had been prosecuted with reasonable diligence, the existence of the mortgage would necessarily have been developed.[75]

Oklahoma apparently also would allow a subsequent purchaser to take free of a defectively formalized conveyance even if the purchaser has seen a physically recorded copy of the conveyance.[76] In New York, the validity of an unacknowledged, unwitnessed deed as against third persons also is uncertain. A statute provides:

> A grant in fee or of a freehold estate, must be subscribed by the person from whom the estate or interest conveyed is intended to pass, or by his lawful agent thereunto authorized in writing. If not duly acknowledged before its delivery, according to the provisions of this chapter, its execution and delivery must be attested by at least one witness, or, if not so attested, it does not take effect as against a subsequent purchaser or incumbrancer until so acknowledged.[77]

The New York courts have interpreted the statute to mean that a defectively formalized instrument is ineffective against a subsequent purchaser or incumbrancer even if the subsequent transferee knows of the instrument itself.[78] The New York Court of Appeals, in an opinion by Judge Cardozo,[79] somewhat limited the scope of the statute,[80] but the provision apparently remains a significant

75. *Id.* at 23-24, 119 P. at 353 (Mason, J., dissenting).

76. *See* Smith v. Thompson, 402 P.2d 882 (Okla. 1965). *See also* 20 OKLA. L. REV. 83 (1967) (advocating that an actual viewing of a defectively acknowledged instrument in records should be at least inquiry notice and suggests that *Smith* is ambiguous enough on the point to allow court now to adopt this position).

77. N.Y. REAL PROP. LAW § 243 (McKinney 1968).

78. Nellis v. Munson, 108 N.Y. 453, 15 N.E. 739 (1888); Dunn v. Dunn, 151 A.D. 800, 136 N.Y.S. 282 (1912).

79. City of New York v. New York & S. Brooklyn Steam Transp. Co., 231 N.Y. 18, 131 N.E. 554 (1921).

80. The court held that *Nellis* decided only the effect of notice when restricted to the deed: "The question is distinctly reserved in Nellis v. Munson . . . whether different effect

threat to the third-party validity of defectively formalized conveyances in New York.

Arkansas[81] and Hawaii[82] endorse the majority view, requiring subsequent purchasers having actual knowledge of defectively formalized but physically recorded instruments to take subject to the prior conveyances.[83] Both states treat mortgages differently, however, allowing subsequent transferees who have actual knowledge to take free of prior conveyances.[84]

Finally, in a number of states, compliance with prescribed formality has little or nothing to do with the validity of a conveyance against third parties. Statutes in Colorado[85] and Illinois[86] have been interpreted to mean that unacknowledged, unwitnessed instruments are fully eligible for recording.[87] The Alabama recording officials must accept for recording any "[document] purporting to convey [an] interest in any real estate" that has been "executed in accordance with law . . . ."[88] In *Niehuss v. Ford*,[89] an Alabama court held that an unacknowledged, unattested conveyance signed by the grantor and delivered to the grantee, may be recorded under the statute; although such an instrument conveys no legal interest,[90] it does operate to convey an equitable interest[91] and therefore fits the description of a recordable document. Connecticut accomplishes the *Niehuss* result by statute.[92] Michigan, Minnesota, North Dakota, and Wisconsin distinguish between an instrument's eligibility for recording and its status if it actually

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may not be given to notice of extrinsic equities. That question is now here. Possession and improvements are effective against subsequent purchasers if the possessor of the land is there without a deed. We find it inconceivable that they should be ineffective, in like circumstances of notice, when he is there with an imperfect deed." *Id.* at 26, 131 N.E. at 557.

81. *See* Prince v. Alford, 173 Ark. 633, 293 S.W. 36 (1927).

82. *See* Aiau v. Kupau, 4 Haw. 384 (1881).

83. See notes 66-68 & accompanying text *supra*.

84. *See* Wright v. Graham, 42 Ark. 140 (1883); Lalakea v. Hilo Sugar Co., 15 Haw. 570 (1904).

85. COLO. REV. STAT. § 38-35-106 (1973) (unacknowledged deed which has remained of record for ten years deemed to have been properly acknowledged).

86. ILL. ANN. STAT. ch. 30, § 30 (Smith-Hurd 1969) (unacknowledged conveyances deemed from time of being filed for record to constitute notice).

87. *See* Montague & Co. v. Aygarn, 164 Ill. App. 596 (1911); 1 E. KING, COLORADO PRACTICE 195 (1970).

88. ALA. CODE § 35-4-51 (1975).

89. 251 Ala. 529, 38 So. 2d 484 (1949).

90. See notes 37-39 & accompanying text *supra*.

91. See note 39 & accompanying text *supra*.

92. CONN. GEN. STAT. ANN. § 47-17 (West 1978).

reaches the real estate records. In these states if an "ineligible"[93] instrument actually is placed in the records, the instrument is treated as legally recorded and therefore gives constructive notice.[94]

The USLTA

Section 2-301 of the USLTA provides that "no . . . acknowledgment, seal, or witness is required for a document to be eligible for recording."[95] Thus, under the USLTA a physically recorded conveyance lacking pre-USLTA formality is a legally recorded conveyance. As a result, recordation affords protection against subsequently arising interests.[96]

Evidentiary Value

The Current Law

Even if state legislatures abolished the property rules that require acknowledgments and kindred formalities, a well-counseled transferee still would insist not only that the transferor and a notary complete the acknowledgment ritual, but also that at least the more recent[97] conveyances in the transferor's recorded chain of title[98] bear regular acknowledgment certificates or equivalent formalities. Such an insistence on formality would be based on the evidentiary significance of the notary's certificate. If a transferee's

93. The four states continue to impose statutory formality for recording. MICH. COMP. LAWS ANN. § 565.23 (1967) (certificate of acknowledgment or proof of execution); MINN. STAT. ANN. § 507.24 (West Supp. 1979) (certificate of acknowledgment); N.D. CENT. CODE § 47-19-03 (1978) (acknowledgment or proof); WIS. STAT. ANN. § 706.05 (West Special Pamphlet 1980) (acknowledgment). A Minnesota statute prohibits a recorder from recording an unacknowledged instrument and prescribes criminal and civil penalties for recorders who violate the section. MINN. STAT. ANN. § 386.39 (West Supp. 1979). *See* Brown v. McCormack, 28 Mich. 215, 221 (1873) (registers required to abstain from recording defective papers).

94. MICH. COMP. LAWS ANN. § 565.604 (1967); MINN. STAT. ANN. § 507.24 (West Supp. 1979); N.D. CENT. CODE § 47-19-41 (1978); WIS. STAT. ANN. § 706.05(7) (West Special Pamphlet 1980). The North Dakota statute may have been prompted by Crum, *Five Steps Toward Sounder Record Title*, 32 N.D.L. REV. 223, 232 (1956).

95. USLTA § 2-301(b).

96. Under the principal priority provision of USLTA the claim of a purchaser for value who has recorded his or her conveyance is subordinated to an "adverse claim that is . . . created or evidenced by a document recorded before the conveyance to the purchaser is recorded . . . ." USLTA § 3-202(a)(1).

97. See note 114 & accompanying text *infra*.

98. See notes 182-83 & accompanying text *infra*.

ownership claim is challenged, the transferee will want to show the jury both the deed from the transferor and the other recorded links in the chain of title. If, however, either the transferee's conveyance, whether the original or a recorded copy, or another link in the chain of title lacks an acknowledgment certificate or the like, there is a risk that a court would disallow altogether introduction of the instrument into evidence. Conversely, the presence of an acknowledgment certificate on a conveyance may result in both the instrument's admission into evidence and the shifting of the burden to the transferee's challenger to disprove the genuineness of the conveyance by clear and convincing evidence.

Admissibility

Although the purpose of the recording statutes is to protect subsequent purchasers,[99] recording schemes fulfill at least one other function—to enable a property owner to demonstrate title by producing recorded copies of the chain of written conveyances ending with the conveyance to the owner.[100] The early courts understood the evidentiary purpose of the recording acts,[101] but still were reluctant in some cases to admit in evidence recorded copies of conveyances. The courts reasoned that the fact that a conveyance had been copied into the public land records gave no assurance in itself that the original instrument was genuine.[102] Thus, the rule evolved that a recorded copy of an instrument could be introduced in evidence *if* the recording scheme required the official custodian of the records to ensure the authenticity of a conveyance before recording it.[103] This rule linking admissibility of a record to a recordkeeper's official duty to check for authenticity was based on the assumption that the recorded copy need pass some initial test of genuineness as a prerequisite for admission before the jury. That assumption can be traced to the common law evidentiary rule of "authentication."[104] Under this rule, "the purported signature or recital of authorship on the face of a writing will *not* be accepted

99. See note 62 & accompanying text *supra*.

100. *See* P. BASYE, CLEARING LAND TITLES § 11 (2d ed. 1970) [hereinafter cited as BASYE].

101. *See* 5 J. WIGMORE, EVIDENCE § 1648, at 721 (Chadbourn rev. 1974).

102. *Id.* at 720.

103. *Id.* at 724.

104. *See generally* C. MCCORMICK, EVIDENCE §§ 218-228 (2d ed. 1972) [hereinafter cited as MCCORMICK].

as sufficient preliminary proof of authenticity to secure the admission of the writing in evidence."[105] The courts regarded the recordkeeper's public duty to check for genuineness as the sufficient preliminary evidence of authenticity demanded by the rule.[106] On the same principle, the courts also admitted recorded copies of instruments if the particular recording scheme required that conveyances be acknowledged or proved as a prerequisite for recording, although the scheme did not obligate the recordkeeper to check for genuineness.[107] The notary was regarded as a surrogate for the recordkeeper in performing the authentication function.[108]

The judicial approach to determining the admissibility of recorded copies of conveyances has influenced legislation in the area. Most jurisdictions have enacted statutes specifically allowing recorded copies of instruments to be admitted in evidence,[109] but because most recording statutes require a certificate of acknowledgment or proof as a prerequisite for proper recording,[110] the effect is the same as the judicially developed rule.[111]

The absence of a certificate of acknowledgment or proof,

105. *Id.* § 218, at 544 (emphasis in original).
106. *Id.* § 224.
107. 5 J. WIGMORE, EVIDENCE § 1648, at 724 (Chadbourn rev. 1974).
108. *Id.*
109. *Id.* § 1651, at 731 n.4 (statutes collected).
110. See notes 56-60 & accompanying text *supra.*
111. "An instrument, even though recorded, may be improperly executed or acknowledged and therefore inadmissible in evidence notwithstanding the fact that it may have constituted an effective conveyance as between the parties." BASYE, *supra* note 100, § 11, at 76 (footnote omitted). Even in states where a recorded conveyance gives constructive notice despite noncompliance with statutorily prescribed formality, see notes 85-94 & accompanying text *supra,* the recorded conveyance may need a certificate of acknowledgment or proof to gain admission into evidence. For example, ILL. STAT. ANN. ch. 30, § 30 (Smith-Hurd 1969) states: "Deeds, mortgages and other instruments of writing relating to real estate shall be deemed, from the time of being filed for the record, notice to subsequent purchasers and creditors, though not acknowledged or proven according to law; but the same shall not be read in evidence, unless their execution be proved in manner required by the rules of evidence applicable to such writings, so as to supply the defects of such acknowledgement or proof."

Thus far this analysis has not touched on the case of the unrecorded, original conveyance. The common law was reluctant to treat even an acknowledged original as sufficiently trustworthy to be shown to the jury, the institution of the notary not having caught on in England as it had on the continent. *See* 5 J. WIGMORE, EVIDENCE § 1676 (Chadbourn rev. 1974). In the United States, however, many states have enacted legislation making acknowledged or proved instruments admissible whether or not the instruments have been recorded. *Id.* at 846 n.9 (statutes collected). *Contra,* DEL. CODE ANN. tit. 25, § 155 (1974) (no acknowledgment or proof shall make deed evidence unless duly recorded).

therefore, can be a significant threat to an instrument's admissibility in evidence, because the notarially deficient instrument is subject to the full rigor of the authentication requirement. The notary's certificate is not the exclusive means, however, of providing sufficient preliminary evidence of authenticity. Witnesses to the conveyance can be called,[112] if they can be found.[113] If the conveyance is old enough, it can be admitted as an "ancient" document.[114] The virtue of the certificate of acknowledgment or proof is that it obviates the necessity of relying on these other means of authentication.

Presumption of Genuineness

In most states the certificate of acknowledgment or proof not only ensures a conveyance's admissibility in evidence; it also triggers a presumption in favor of the genuineness of the instrument.[115] The strength of the presumption varies. Under one formu-

112. McCORMICK, *supra* note 104, § 219.

113. Regarding the limitations of such proof, see BASYE, *supra* note 100, § 12, at 77.

114. "A writing which has been in existence for a number of years will frequently be difficult to authenticate by direct evidence. Where the maker of an instrument, those who witnessed the making, and even those familiar with the maker's handwriting have over the course of years died or become unavailable, the need to resort to authentication by circumstantial evidence is apparent. The circumstances which may, in a given case, raise an inference of the genuineness of an aged writing are of course quite varied, and any combination of circumstances sufficient to support a finding of genuineness will be appropriate authentication. . . .

"The frequent necessity of authenticating ancient writings by circumstantial evidence plus the consideration that certain of the above facts probative of authenticity are commonly found associated with genuine older writings have led the courts to develop a rule of thumb for dealing with the question. Under this rule a writing is sufficiently authenticated as an ancient document if the party who offers it satisfies the judge that the writing is thirty years old, that it is unsuspicious in appearance, and further proves that the writing is produced from a place of custody natural for such a document. In addition to the foregoing requirements, some jurisdictions, if the writing is a dispositive one such as a deed or a will, impose the additional condition that possession must have been taken under the instrument . . . ." McCORMICK, *supra* note 104, § 223 (footnotes omitted).

115. *See* Jordan v. Conservation & Land Co., 273 Ala. 99, 134 So. 2d 777 (1961) (person attacking acknowledged, recorded deed as forgery must show forgery by clear and convincing evidence, reaching high degree of certainty, leaving upon the mind no fair, just doubts of truthfulness of fact); Huskins v. First Fed. Sav. & Loan Ass'n, 394 P.2d 668 (Alaska 1964) (proper acknowledgment creates presumption of genuineness that can be overcome only by clear and convincing evidence showing deed was a forgery); Lynn v. Quillen, 178 Ark. 1150, 13 S.W.2d 264 (1929) (one attacking genuineness of signature on deed properly acknowledged and recorded must show by preponderance of evidence that deed was not in fact signed); Blake v. Blake, 69 Idaho 214, 205 P.2d 495 (1949) (where forgery of deed alleged, acknowledgment of signature on deed not impeached by notary's testimony

lation the factfinder must accept the authenticity of the acknowledged conveyance if no contrary evidence is offered, but may treat

that signature might have been forged); McReynolds v. Stoats, 288 Ill. 22, 122 N.E. 860 (1919) (presumption of execution arising from notary's certificate can be overcome only by clear proof); McMurray v. Crawford, 3 Kan. App. 2d 329, 594 P.2d 1109 (1979) (direct evidence of forgery and nonexecution not sufficient to overcome presumption of execution created by certificate of acknowledgment, which presumption may be rebutted only by clear and convincing evidence); Hoagland v. Fish, 238 S.W.2d 133 (Ky. 1951) (certificate of acknowledgment can be overcome only by clear and convincing evidence that deed was forgery); Hall v. Hall, 190 Mich. 100, 155 N.W. 695 (1916) (certificate in proper form impeachable only by clear, convincing, satisfactory proof of nonexecution); Arnold v. Byrd, 222 So. 2d 410 (Miss. 1969) (presumption of genuineness of properly acknowledged deed can be overcome only by clear, strong, and convincing evidence of forgery); Springhorn v. Springer, 75 Mont. 294, 243 P. 803 (1926) (certificate of acknowledgment makes prima facie case of genuineness as strong as if witness had sworn to facts in open court); Kucaba v. Kucaba, 146 Neb. 116, 18 N.W.2d 645 (1945) (acknowledged deed will not be set aside as forgery absent clear and convincing evidence); Dencer v. Erb, 142 N.J. Eq. 422, 60 A.2d 282 (1948) (statements contained in acknowledgment may be shown untrue, but to overcome strong presumption of integrity, proof must be clear, satisfactory, and convincing); Gutierrez v. Gianini, 64 N.M. 64, 323 P.2d 1102 (1958) (acknowledged instruments may be set aside as forgery only on clear and convincing evidence); Albany County Sav. Bank v. McCarty, 149 N.Y. 71, 43 N.E. 427 (1896) (between parties, certificate of acknowledgment makes a case as strong as if the facts certified had been duly sworn in open court by witness apparently disinterested and worthy of belief); Klundt v. Pfeifle, 77 N.D. 132, 41 N.W.2d 416 (1950) (nonexecution of acknowledged instrument must be shown by clear and convincing evidence); Weaver v. Crommes, 109 Ohio App. 470, 167 N.E.2d 661 (1959) (presumption of validity of grantor's signature on properly formalized instrument can be overcome only by clear and convincing evidence); Bauder v. Bauder, 195 Okla. 85, 155 P.2d 543 (1945) (general rule is that acknowledged deed will be declared a forgery only on clear and convincing evidence, but if it appears grantor did not appear before notary, evidentiary force of acknowledgment is destroyed or greatly lessened); Pusic v. Salak, 261 Pa. 512, 104 A. 751 (1918) (where acknowledged deed is attacked as fraudulent, evidence must be clear and satisfactory); Abram v. Southeastern Fund, 404 S.W.2d 673 (Tex. Civ. App. 1966) (filing of affidavit of forgery does not constitute proof thereof; before submitting issue of genuineness to jury a court must find that proof is clear and unmistakable); Northcrest, Inc. v. Walker Bank & Trust Co., 122 Utah 268, 248 P.2d 692 (1952) (instrument bearing certificate of acknowledgment will be set aside as forgery on clear and convincing evidence); Burson v. Andes, 83 Va. 445, 8 S.E. 249 (1887) (in the absence of fraud, certificate of notary is conclusive evidence of facts stated therein and required by statute); Lohnes v. Meenk Lumber Co., 18 Wash. 2d 251, 138 P.2d 885 (1943) (validity of certificate of acknowledgment cannot be successfully challenged by unsupported testimony of grantors, but corroborated testimony that is clear, cogent, and convincing may be enough to overcome the presumption); Roberts v. Huntington Dev. & Gas Co., 89 W. Va. 384, 109 S.E. 348 (1921) (acknowledged deed will be set aside as forgery only on evidence that is clear, cogent, satisfactory, and convincing beyond reasonable doubt or controversy); Linde v. Gudden, 109 Wis. 326, 85 N.W. 323 (1901) (nonexecution of acknowledged deed can be proved only by clear, convincing, and satisfactory evidence; defense of nonexecution of deed must be established "beyond all reasonable controversy"); Rowray v. Casper Mut. Bldg. & Loan Ass'n, 48 Wyo. 290, 45 P.2d 7 (1935) (allegation that grantor did not sign or acknowledge signature must be shown by clear, convincing, and satisfactory evidence).

the instrument as any other evidence—that is, vulnerable to the jury's acceptance or rejection—once contrary evidence is introduced.[116] A somewhat stronger formulation shifts the burden of persuasion by requiring the challenger of the acknowledged instrument to show by a preponderance of the evidence the conveyance's inauthenticity.[117] The strongest and most widely accepted formulation requires the opponent of an acknowledged or proved instrument to show by the more rigorous standard of clear and convincing evidence[118] that the instrument is not authentic.[119]

116. *See* Dempsey v. Allen, 210 Minn. 395, 298 N.W. 570 (1941); Springhorn v. Springer, 75 Mont. 294, 243 P. 803 (1926); Albany County Sav. Bank v. McCarty, 149 N.Y. 71, 43 N.E. 427 (1896).

117. *See* Lynn v. Quillen, 178 Ark. 1150, 13 S.W.2d 624 (1929); Taylor v. Claybrook, 171 Ark. 1189, 288 S.W. 720 (1926).

118. *See* Jordan v. Conservation & Land Co., 273 Ala. 99, 134 So. 2d 777 (1961); Huskins v. First Fed. Sav. & Loan Ass'n, 394 P.2d 668 (Alaska 1964); McReynolds v. Stoats, 288 Ill. 22, 122 N.E. 860 (1919); McMurray v. Crawford, 3 Kan. App. 2d 329, 594 P.2d 1109 (1979); Hoagland v. Fish, 238 S.W.2d 133 (Ky. 1951); Hall v. Hall, 190 Mich. 100, 155 N.W. 695 (1916); Arnold v. Byrd, 222 So. 2d 410 (Miss. 1969); Kucaba v. Kucaba, 146 Neb. 116, 18 N.W.2d 645 (1945); Gutierrez v. Gianini, 64 N.M. 64, 323 P.2d 1102 (1958); Klundt v. Pfeifle, 77 N.D. 132, 41 N.W.2d 416 (1950); Weaver v. Crommes, 109 Ohio App. 470, 167 N.E.2d 661 (1959); Bauder v. Bauder, 195 Okla. 85, 155 P.2d 543 (1945); Pusic v. Salak, 261 Pa. 512, 104 A. 751 (1918); Abram v. Southeastern Fund, 404 S.W.2d 673 (Tex. Civ. App. 1966); Northcrest, Inc. v. Walker Bank & Trust Co., 122 Utah 268, 248 P.2d 692 (1952); Roberts v. Huntington Dev. & Gas Co., 89 W. Va. 384, 109 S.E. 348 (1921); Linde v. Gudden, 109 Wis. 326, 85 N.W. 323 (1901); Rowray v. Casper Mut. Bldg. & Loan Ass'n, 48 Wyo. 290, 45 P.2d 7 (1935).

119. The need to give security to land titles underlies the judicial willingness to accord an acknowledged conveyance a strong presumption of genuineness: "Are these facts and circumstances and the testimony of these witnesses sufficient to overthrow and brand as a forgery a solemn deed or instrument, twenty-five years after it purports to have been executed before a public officer? If so, there is little safety in the titles to land. The treachery of memories, and the cupidity and avarice of former owners and claimants of the land would be sufficient to overthrow deeds and other instruments." Roberts v. Huntington Dev. & Gas Co., 89 W. Va. 384, 391, 109 S.E. 348, 351 (1921).

In a case decided before the advent of photocopied conveyancing records, one court declined to apply the clear and convincing evidence presumption to an acknowledged, recorded copy of a deed because the acknowledgment itself might be used in furtherance of fraud: "The common-law rule requiring that there must be strong, clear, and convincing testimony to overcome the recitals of the certificate of acknowledgment . . . grew up with . . . the . . . rule requiring the party offering a deed to produce the original instrument and prove its due execution, and when the statute of this state abrogated the common-law rule requiring the production of the original instrument and proof of its execution, and substituted in place thereof a recorded copy, without proof of execution, some of the reasons for the rule requiring such strong, clear, and convincing evidence to overcome the recitals of the certificate of acknowledgment ceased to exist . . . . The object of [the statute] was to render more secure recorded real estate titles, but in the instance of forged deeds, especially where the forgery is not discovered until after many years, it may also furnish a convenient method for robbing a true owner of his land. One forging a deed to title to real property

The USLTA

Section 2-305 of the USLTA accords a number of evidentiary presumptions to a "recorded signed document,"[120] including a presumption that "the document is genuine and was executed as the voluntary act of the person purporting to execute it . . . ."[121] The term "presumption" as used in section 2-305 "means that the party against whom the presumption is directed has the burden of *proving* that the non-existence of the presumed fact is *more probable* than its existence."[122] One author has offered the view that section 2-305 "does not make any drastic departures from existing state law, statutory or decisional"[123] primarily because "[s]tatutes in a number of states have the effect of providing that the recording of a conveyance is evidence of due execution . . . ."[124] The full significance of section 2-305, however, becomes apparent when the section is read in conjunction with section 2-301, which provides that an unacknowledged, unwitnessed conveyance is entitled to recordation.[125] The two sections together suggest that a signed conveyance lacking any other formality can be recorded and that, when recorded, it becomes the beneficiary of strong evidentiary presumptions. Such treatment of unacknowledged, unproved in-

might, under this statute, place the same on record, then burn or otherwise destroy the original forged instrument, keep quiet for many years until a time when it is exceedingly difficult for the true owner of the land to prove the surrounding circumstances, and then go into court and rely on the recitals in the recorded copy of the certificate of acknowledgment to the forged instrument, and the true owner of the land could have no other testimony than his own oath, and which, we are of the opinion, might be amply sufficient to justify a finding in his favor by the jury or trial court. . . . Under the rule requiring the production of the original instrument, the signature of the grantor, and also the signature of the notary who signed the certificate, would be in evidence, and the real owner of the land might, in many cases, be able to show by numerous witnesses that the purported signature to the forged instrument was not in his handwriting, and might also be able to show by evidence of that character that the signature of the notary to the certificate of acknowledgment was also a forgery . . . . Under these circumstances the strict rule in regard to the sacredness of the certificate of acknowledgment should be relaxed." Vesey v. Solberg, 27 S.D. 618, 621-22, 132 N.W. 254, 255-56 (1911). Presumably the *Vesey* court would have been less concerned about the strength of the presumption of genuineness if the record of the deed had consisted of a picture of the original, showing the grantor's signature.

120. USLTA § 2-305(a).

121. *Id.* § 2-305(a)(1).

122. *Id.* § 1-201(13) (emphasis added).

123. Comment, *The Uniform Simplification of Land Transfers Act: Areas of Departure from State Law*, 73 Nw. U.L. Rev. 359, 375 (1978).

124. *Id.* at 374.

125. See notes 95-96 & accompanying text *supra*.

struments contravenes current law. The statutes cited by the commentator [126] allow *properly* recorded copies of conveyances into evidence, and under current law a conveyance is properly recorded only if it adheres to prescribed formality—usually a certificate of acknowledgment or proof.[127] Moreover, the link between a notary's certificate and the admissibility of a physically recorded copy of an instrument transcends coincidence. The existing statutes must be read against the judicially evolved rule that a recorded copy is admissible without further proof only if the particular recording scheme includes a requirement that an official verify the genuineness of the offered instrument.[128] Thus, the USLTA sections 2-301 and 2-305, which together abandon the logic of the current statutes and the judicial rule that preceded the statutes, should be viewed as substantial alterations of existing law.

Curative Legislation

> The possibility of error is inherent in any human activity. The conveyancer's art is no exception. Because of the frequency with which land has been transferred in this country, and because some of the many persons who have engaged in the conveyancer's art of drafting deeds and other legal instruments affecting land titles have lacked sufficient skill, it is inevitable that conveyances and instruments should repeatedly be found ineffective for their intended purpose. Our land records are full of such instruments.[129]

Instruments lacking proper acknowledgments or analogous formalities might be ineffective as between the parties[130] or as against some third persons,[131] and might not be admissible in evidence,[132] much less entitled to any presumption of genuineness.[133] The potentially disastrous consequences associated with the neglect of the formalities nonetheless would not be a great source of concern if virtually all real estate transactions included execution of the appropriate formalities. As Professor Basye points out, how-

126. Comment, *The Uniform Simplification of Land Transfers Act: Areas of Departure from State Law*, 73 NW. U.L. REV. 359, 374 n.100 (1978).

127. See notes 101-11 & accompanying text *supra*.

128. See notes 103-08 & accompanying text *supra*.

129. BASYE, *supra* note 100, § 202, at 464.

130. See notes 28-53 & accompanying text *supra*.

131. See notes 56-94 & accompanying text *supra*.

132. See notes 97-114 & accompanying text *supra*.

133. See notes 115-19 & accompanying text *supra*.

ever, a great number of defective instruments have entered the records. Notwithstanding their existence, it would be unrealistic to suppose that many of those instruments were produced by fraudulent schemes. The bulk of the defective instruments surely were created in transactions intended by the parties to have full legal effect. Moreover, such conveyances are links in chains of title that support legitimate interests deserving protection.

The state legislatures have been sensitive to the frequency of the transfers of real property by formally defective conveyances. Many have enacted provisions termed "curative legislation"[134] literally to cure defects in recorded conveyances. There is little uniformity in the various statutes, and many jurisdictions have chosen not to adopt serious curative legislation at all.[135] Even if all of the states were to adopt curative legislation,[136] however, there would be no comprehensive cure of the sort offered by USLTA. The central weakness of most of the enacted curative statutes is that a period of time must pass,[137] usually a very long time, before a physically recorded instrument lacking proper formality is affected by the statutes. During the interval between the time of the transaction producing the instrument and the point at which the cure is administered, the consequences resulting from a failure to comply with required formality may occur.[138]

An 1868 Kansas provision curing conveyances recorded prior to the enactment of the statute[139] is illustrative of the early ap-

134. For a discussion of the nature and purpose of curative legislation, see BASYE, *supra* note 100, §§ 201-209.

135. "[These states] either have not admitted that mistakes are made or have contended that they do not present a problem to local land titles." *Id.* § 202, at 465. In contrast, a Washington court reasoned: "[G]rief and hardship . . . have been caused by the lack of such [curative legislation]; for, under such circumstances conveyances have been very generally declared not to have imparted any notice if in any way defective. . . . [D]efectively acknowledged conveyances, and even conveyances which do not purport to have been acknowledged at all, frequently get of record. Some auditors receive and record any instrument presented. Others, no doubt, might refuse to record a conveyance when an acknowledgment is wholly lacking, but accept for record one purporting to be acknowledged, although he believed the acknowledgment defective, thus properly giving it the benefit of the doubt." Eggert v. Ford, 21 Wash. 2d 152, 159-60, 150 P.2d 719, 722-23 (1944).

136. Unlike Professor Basye, BASYE, *supra* note 100, § 208, this author does not include within the definition of curative legislation those statutes that altogether remove formal requirements such as acknowledgment.

137. See notes 148-49 & accompanying text *infra*.

138. See text accompanying notes 4-7 *supra*.

139. KAN. STAT. ANN. § 58-2231 (1976) states: "All instruments of writing now copied into the proper books of the office of register of deeds . . . shall, upon the passage of this

proach to curative legislation.[140] At least two practical difficulties attend the early approach. First, if it is assumed that some uniform time lag should exist between the creation of a defective instrument and its cure,[141] such a hiatus is not guaranteed by the statute. A deed recorded the day before passage presumably would be cured at passage just as would a deed recorded ten years previously. A second and more serious problem with the approach is that no defectively formalized conveyances recorded after passage of the act are cured. The Kansas legislature's answer to this second problem, again illustrative of the approach taken in other states,[142] was to enact provisions virtually identical to the 1868 statute in 1887[143] and 1901.[144] Finally, the Kansas legislature abandoned the approach altogether and enacted a statute providing in general that instruments on record for a period of ten years shall impart notice and serve as evidence of title to the same extent as properly formalized and recorded instruments.[145] This provision answers

act, be deemed to impart to subsequent purchasers and encumbrancers, and all other persons whomsoever, notice of all . . . instruments, so far as, and to the extent that, the same may be found recorded, copied or noted in said books of record, notwithstanding any defects existing in the execution, acknowledgment, recording or certificate of recording the same; and the record of any such instrument, or a duly authenticated copy thereof, shall be competent evidence whenever . . . the original is shown to be lost, or not belonging to the party wishing to use the same, or not within his or her control: *Provided,* That nothing herein contained shall be construed to affect any rights heretofore acquired in the hands of subsequent grantees, assignees or encumbrancers."

140. *See* BASYE, *supra* note 100, § 208.

141. This author takes the position that no such time lag is desirable.

142. *See* BASYE, *supra* note 100, § 208.

143. KAN. STAT. ANN. § 58-2235 (1976).

144. *Id.* § 58-2236.

145. "When any instrument . . . shall have been on record in the office of the register of deeds . . . for the period of ten (10) years, and there is a defect in such instrument because it has not been signed by the proper officer of any corporation, or because of any discrepancy in the corporate name, or because the corporate seal of the corporation has not been impressed on such instrument, or because the record does not show such seal, or because such instrument is not acknowledged, or because of any defect in the execution, acknowledgment, recording or certificate of recording the same, such instrument shall, from and after the expiration of ten (10) years from the filing thereof for record, be valid as though such instrument had, in the first instance, been in all respects duly executed, acknowledged, and certified, and contained the true corporate name, and such instrument shall, after the expiration of ten (10) years from the filing of the same for record, impart to subsequent purchasers, encumbrancers and all other persons whomsoever, notice of such instrument of writing so far as and to the same extent that the same may then be recorded, copied or noted in such books of record, notwithstanding such defect.

"Such instrument or the record thereof, or a duly authenticated copy thereof, shall be competent evidence without requiring the original to be produced or accounted for to the same extent that written instruments, duly executed and acknowledged, or the record

both of the criticisms of the earlier approach; a uniform ten-year period is required for the cure of all instruments, and the statute cures instruments recorded *after* the effective date of the act. In addition, unlike statutes in some other states, it is relatively comprehensive. It explicitly treats both the constructive notice and the evidentiary consequences of informality,[146] and it cures defects in the execution, acknowledgment, recording, or certificate of recording, including the complete omission of an acknowledgment.[147]

The approach exemplified by the Kansas statute, despite its clear advantages over other approaches to curative legislation, still imposes a ten-year period during which all of the maladies that might befall a defectively formalized conveyance might occur. The ten-year period is not uncommon among the states;[148] in fact, some statutes prescribe an even longer period,[149] leaving little distinction—at least on the evidentiary side—between the statutes and the common law rule allowing ancient documents into evidence.[150] Professor Basye suggests that "to delay the [curative] effect for 10 or 20 years would largely nullify the potential effect achievable by the acts. An intervening period of two or three years would seem reasonable and most likely to accomplish the intended cure of defective documents."[151]

California legislation approaches Professor Basye's ideal. Cali-

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thereof, are competent: *Provided,* That nothing herein contained shall be construed to affect any rights acquired by grantees, assignees or encumbrancers subsequent to the filing of such instrument for record and prior to the expiration of ten (10) years from the filing of such instrument for record." *Id.* § 58-2237.

146. *Compare id. with* GA. CODE ANN. § 29-112 (1969) (essentially a codification of common law rule allowing ancient documents into evidence; no provision whatsoever curing constructive notice infirmity).

147. *Compare* KAN. STAT. ANN. § 58-2237 (1976) *with* ARK. STAT. ANN. § 49-213 (1971) (various specific defects cured), *construed in* Pardo v. Creamer, 228 Ark. 746, 310 S.W.2d 218 (1958) (curative statute cannot supply acknowledgment when there is none). *See generally* BASYE, *supra* note 100, §§ 241-247.

148. *See* ALA. CODE § 35-4-72 (1975); COLO. REV. STAT. § 38-35-106(2) (1974); MASS. GEN. LAWS ANN. ch. 184, § 24 (West 1977); MICH. COMP. LAWS ANN. § 565.8 (1967); NEB. REV. STAT. § 76-258 (1976); N.H. REV. STAT. ANN. § 477:16 (Supp. 1979); OKLA. STAT. ANN. tit. 16, § 27a (West 1953); TEX. REV. CIV. STAT. ANN. art. 3726 (Vernon Supp. 1979); WYO. STAT. § 34-109 (1977).

149. *See* MISS. CODE ANN. § 89-5-13 (1973) (20 years); MO. ANN. STAT. §§ 490.340-.350 (Vernon Supp. 1980) (one year for constructive notice but 30 years for admission into evidence); N.Y. REAL PROP. LAW § 306 (McKinney 1968) (15 years); OHIO REV. CODE ANN. § 5301.07 (Page 1970) (21 years); VT. STAT. ANN. tit. 27, § 348 (Supp. 1980) (15 years).

150. See note 114 & accompanying text *supra.*

151. BASYE, *supra* note 100, § 209, at 475.

fornia Civil Code section 1207 states:

> Any instrument affecting the title to real property, one year after the same has been copied into the proper book of record, . . . imparts notice of its contents to subsequent purchasers and encumbrancers, notwithstanding any defect, omission, or informality in the execution of the instrument, or in the certificate of acknowledgment thereof, or the absence of any such certificate; but nothing herein affects the rights of purchasers or encumbrancers previous to the taking effect of this act. Duly certified copies of the record of any such instrument may be read in evidence with like effect as copies of an instrument duly acknowledged and recorded; *provided,* when such copying in the proper book of record occurred within five years prior to the trial of the action, it is first shown that the original instrument was genuine.[152]

Widespread adoption of the California provision would significantly reduce the title insecurity produced by the rules about informality, but even the California approach may be questioned. It is unclear why even a year must pass to give a physically recorded but unacknowledged conveyance effect as constructive notice and at least some effect as evidence. The ultimate cure can be administered by changing the rules that created the need for "curative" legislation in the first place.

The Case for the USLTA Reforms

The USLTA opens the land records to conveyances lacking notarial certificates,[153] thus ending the constructive notice infirmity now imposed on physically recorded, but defectively formalized instruments.[154] In addition, the USLTA accords a strong presumption of genuineness to signed, recorded instruments,[155] thus discarding the current insistence on some preliminary proof of authenticity before a defectively formalized instrument is admissible into evidence.[156]

No one has empirically quantified the harm caused by the evidentiary infirmity and the constructive notice handicap imposed by the existing law. One state court, having surveyed the

152. CAL. CIV. CODE § 1207 (West 1954).
153. See notes 95-96 & accompanying text *supra.*
154. See notes 57-60 & accompanying text *supra.*
155. See notes 120-21 & accompanying text *supra.*
156. See notes 100-11 & accompanying text *supra.*

usual sources, lamented the "grief and hardship" caused in "an astounding number of . . . cases" by the constructive notice infirmity.[157] The authentication rule has been described as at best time consuming and expensive, and at worst productive of results "which are virtually indefensible."[158] Presumably, the "indefensible results" and the "grief and hardship" refer to instances in which applying rules of constructive notice and evidence invalidated transactions that the parties intended and expected to be given full legal effect. Indeed, the empirical assumption underlying the most powerful criticism of prescribed formality is that most instruments lacking proper formality were generated in legitimate transactions.[159] The legislative reluctance thus far to do more than pass curative statutes probably does not reflect rejection of this empirical assumption, but rather indicates a belief that the benefits to be derived from conveyancing formality justify the risk of frustrating the legitimate expectations of some individuals.

Evidentiary Value

Refusing to admit an unacknowledged conveyance in evidence without preliminary proof of authenticity suggests a presumption that the instrument is not authentic. Such a presumption is quite contrary to ordinary social expectations:

> In the every day affairs of business and social life, it is the custom to look merely at the writing itself for evidence as to its source. Thus, if the writing bears a signature purporting to be that of X, or recites that it was made by him, we assume, nothing to the contrary appearing, that it is exactly what it purports to be, the work of X. At this point, however, the law of evidence has long differed from the commonsense assumption upon which each of us conducts his own affairs, adopting instead the position that the purported signature or recital of authorship on the face of a writing will *not* be accepted as sufficient preliminary proof of authenticity to secure the admission of the writing in evidence. . . .
>
> [W]hile traditional requirements of authentication admittedly furnish some slight obstacles to the perpetration of fraud or occurrence of mistake in the presentation of writings, it has fre-

157. Eggert v. Ford, 21 Wash. 2d 152, 159-60, 150 P.2d 719, 722-23 (1944).

158. McCormick, *supra* note 104, § 218, at 544 (footnote omitted). The cases cited in the omitted footnote do not relate to land transfers, but were offered merely as examples; presumably land cases might have been used as well.

159. See note 160 & accompanying text *infra*.

> quently been questioned whether these benefits are not outweighed by the time, expense, and occasional untoward results entailed by the traditional negative attitude toward authenticity of writings.[160]

The USLTA's drafters concluded that the existing rules of conveyancing formality are based on faith in the notarial ritual as a deterrent to fraud and that the presence of a certificate of acknowledgment on a conveyance does somewhat increase the probability that the conveyance is genuine.[161] The value of the certificate, however, can be overstated. If a person were shown a pair of conveyances taken from the real estate records, one conveyance bearing and one lacking an acknowledgment certificate, and the person were told to pick the "real" conveyance, the person likely would pick the conveyance bearing the certificate. The probability that the "real" conveyance was the one with the certificate would not be one hundred percent, because the certificate could have been forged or obtained by deceit, but the probability of genuineness would be much greater for the acknowledged instrument. This example is unpersuasive, however, as a justification for the authentication rule because the rule presumes that one of the conveyances is counterfeit. In fact, for any two such conveyances taken from the real estate records, the probability should be very high that *both* are genuine. Thus, the increased probability of genuineness produced by the acknowledgment certificate is not very significant.

The only argument left to proponents of the authentication rule is that although writings are exactly what they appear to be "in 99 out of 100 cases,"[162] the need to root out fraud in the other one percent is so imperative as to require the sacrifice of a certain number of legitimate transactions,[163] especially when the evidentiary handicap can be avoided so easily through the use of a notary. There is no reason to suppose, however, that the number of instances of successful fraud in a world without the authentication rule would exceed the number of legitimate transactions jeopardized by the rule itself. The authentication rule assumes not only that fraud will occur but also that the factfinder will fail to discover it. The jury will be deceived on occasion, of course, but the

160. McCormick, *supra* note 104, § 218, at 544-45 (footnotes omitted).
161. See note 208 *infra*.
162. McCormick, *supra* note 104, § 218, at 544.
163. See notes 129-33 & accompanying text *supra*.

balance arguably tips in favor of accepting that risk rather than the risk of invalidating legitimate conveyances.

The idea that the evidentiary handicap can be avoided easily through the use of a notary exhibits a somewhat utopian attitude towards prophylactic formality. Formal requirements might work well in small populations with infrequent transactions handled by highly skilled legal practitioners. The real estate market of late 20th century America, however, would bewilder the medieval English conveyancer. In such a high volume market, mediated by a conveyancing bar of varying skills, even the simple notarial ritual can be an impractical requirement.[164] The transferee choosing a less competent lawyer or trying to obtain real estate without a lawyer's help should not necessarily bear the costs generated by the propensity of some to commit fraud.

Abandoning the authentication rule would allow unacknowledged, unproved conveyances to be admissible in evidence without preliminary proof of authenticity. The drafters of the USLTA have gone even further. Under the USLTA, a signed, physically recorded conveyance is not only admissible in evidence, but is entitled to a number of evidentiary presumptions, including a presumption of genuineness.[165] The effect of the presumption extends beyond a mere shift in the burden of going forward with evidence.[166] The party opposing the signed, recorded conveyance has the burden of persuading the factfinder that the probability of inauthenticity is greater than the probability of genuineness.[167] The USLTA presumption thus radically departs from existing law because it elevates the status of an informal conveyance from presumptively inadmissible to presumptively genuine, and the presumption of genuineness is almost as strong as the presumption now reserved for instruments bearing notarial certificates.[168]

The rationale for the USLTA presumption lies not so much in the law of evidence[169] as in the law of property. Unless the discretion of the factfinder is controlled by a strong presumption in favor

164. See note 129 & accompanying text *supra*.

165. See note 121 & accompanying text *supra*.

166. *Cf.* note 116 & accompanying text *supra* (jurisdictions in which notarial certificate shifts burden of producing evidence).

167. See note 122 & accompanying text *supra*.

168. See notes 118-19 & accompanying text *supra*.

169. Evidentiary principles probably would dictate at most a shift in the burden of producing evidence. See cases cited at note 116 *supra*.

of the authenticity of the instruments making up a transferee's chain of title,[170] the role of the recorded chain of conveyances as title assurance is threatened. A transferee must be certain that the conveyances he or she shows the jury not only are evidence of the validity of the transfer but are persuasive evidence of its validity.

The USLTA presumption marginally increases the danger of undiscovered fraud because a wrongdoer need only record a false deed to shift the burden to disprove the authenticity of the forged instrument to the other party. This enhanced opportunity for wrongdoing may cause some legislatures to dilute the strength of the USLTA presumption. However, the aggregate harm that would be done by diluting the presumption—measured in increased insecurity of land titles—probably would exceed the aggregate harm of some additional undiscovered fraud. Thus, nonuniform provisions altering the strength of the USLTA presumption should be discouraged.

Constructive Notice

The evidentiary burden imposed on defectively formalized conveyances at least can be understood, if not justified. The prevailing rule denying effect as constructive notice to physically recorded, but notarially defective conveyances defies rational explanation. The baffling feature of the constructive notice rule as it exists in most states is that, although the notarially deficient instrument is denied effect as constructive notice, persons who actually see the defective conveyance in the real estate records are charged with *actual* notice of the conveyance and must take subject to it. In the few jurisdictions where a physically recorded copy lacking prescribed formality is denied effect both as constructive notice and as actual notice, the rule at least has the virtue of explicability, being based partly on the same presumption of inauthenticity that is the basis for the evidentiary handicap. As the Kansas Supreme Court noted in *Nordman v. Rau*:[171] "To hold that the record of an unacknowledged conveyance, if known to a prospective buyer, amounts to actual notice of the instrument, is to compel him to give it force as evidence, which the court itself would

170. The chain of title concept is discussed in the text accompanying notes 182-83 *infra*.

171. 86 Kan. 19, 119 P. 351 (1911).

refuse it."[172] The justification is unpersuasive. As the *Nordman* dissent pointed out,[173] a purchaser should be charged at least with inquiry notice. The license to ignore such a copy is particularly questionable in light of the previous discussion of the authentication rule.[174] Nevertheless, the *Nordman* rule does give the constructive notice handicap the virtue of conceptual coherence. If a document will not count as actual notice when seen, it certainly should not count as constructive notice. Once outside Kansas and the few jurisdictions in which courts hold similarly,[175] however, logical explanation of the constructive notice infirmity becomes very difficult indeed. The infirmity cannot be based on a presumption that the notarially deficient conveyance is inauthentic, because a purchaser who sees the instrument during a title search is charged with actual notice and takes subject to the earlier conveyance.[176]

Another ultimately fruitless analytical path is the hypothesis that the constructive notice rule serves some policy of the recording system. Professor Corwin Johnson has identified two governing principles of American recording schemes: protecting those who rely on the public record as a correct statement of title, and punishing those who fail to record.[177] The punitive sanctions clearly cannot be an end in themselves; they are a means of forcing recordation[178] in order to serve ends such as enhanced marketability. The protection principle, on the other hand, seems to make sense without any teleological justification. Those who rely on the public record are acting consistently with legislative objectives and ought to have their reliance interest protected.

The constructive notice infirmity cannot be said to serve the protection principle because only those who have *not* relied on the state of the record are given protection. Because a purchaser who sees the informal conveyance in the records takes subject to it, only the purchaser who fails to search the records or searches them

172. *Id.* at 22, 119 P. at 353. See text accompanying note 73 *supra.*

173. See note 75 & accompanying text *supra.*

174. See notes 160-64 & accompanying text *supra.*

175. See notes 76-84 & accompanying text *supra.*

176. See note 66 & accompanying text *supra.*

177. Johnson, *Purpose and Scope of Recording Statutes,* 47 IOWA L. REV. 231, 243 (1962).

178. *Id.*

poorly can take free.[179] The interest in punishing those who fail to record is not a satisfactory justification for the constructive notice handicap, either, because it is not at all clear why the punishment is being inflicted—surely not because the system wishes to encourage the use of notarial formality to strengthen the evidentiary value of chains of title; the evidentiary handicap itself would seem sufficient punishment. The punishment rationale, moreover, leaves unexplained the distinction under the constructive notice rules between those who find the defectively acknowledged conveyance and those who do not find it. It makes no sense to punish the "nonrecorder" only in those cases in which the subsequent purchaser fails to make a reasonable title search.

Finally, if the consequences associated with the acknowledgment or proof requirement are justifiable as tools of the punishment principle, the question remains whether that principle itself is justified. "[W]hat purpose, other than protection of those who rely, or are likely to rely, upon the records, is of sufficient magnitude to warrant depriving one of his land for failure to record? . . . [T]he recording system provides no fund for compensating those whose titles are cut off."[180]

So long as the conveyancing rules generally treat an instrument lacking notarial formality as valid between the parties and against those with actual notice, there is insufficient reason for denying the instrument effect as constructive notice when placed in the records. The constructive notice device itself reflects the principle that potential purchasers should make reasonable title searches or be bound by what they would have found in such searches.[181] The principle should apply equally in the case of the notarially informal conveyance.

Eligibility for Recording

Most of the discussion thus far has focused on the evidentiary and constructive notice consequences of the statutes limiting eligibility for recording to properly formalized conveyances, but the concept of eligibility for recording includes another notion: The official custodian of the real estate records has the power to reject

179. See text following note 70 *supra*.

180. Johnson, *Purpose and Scope of Recording Statutes*, 47 IOWA L. REV. 231, 244 (1962).

181. *See* J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 279, 293 (2d ed. 1975).

ineligible documents offered for recordation.

In a jurisdiction that imposes either evidentiary or constructive notice penalties on physically recorded conveyances lacking prescribed formality, it is sensible also to empower, or even require, the official recorder to reject formally deficient instruments offered for recordation. Having the recorder assume a guardianship role achieves more than the somewhat paternalistic goal of protecting a transferee from the consequences of his or her ignorance or imprudence; it also preserves the "marketability function" of the recording statutes. The alienability of Blackacre depends upon a seller holding good title to Blackacre. A purpose of the recording acts is to maximize the alienability of land by minimizing doubt about sellers' titles. One element of the Anglo-American theory of land ownership is that the legitimacy of *X*'s title to Blackacre can depend not only on the validity of the transaction in which *X* became the "owner," but also on the validity of previous transactions in *X*'s "chain of title."[182] A weak link anywhere in the chain may imperil *X*'s claim of ownership. Recording systems ideally create public records showing the chains of title, giving a prospective purchaser the opportunity to evaluate the chain of title to determine the strength of the seller's title.[183] Perhaps more significantly, the systems can require that the records be made in such a way that the chains of title actually are strengthened. If the recorder turns away all conveyances lacking prescribed formality, chains of title are strengthened.

The marketability justification for assigning a guardianship role to the recorder depends on the desirability of retaining either the evidentiary infirmity or the constructive notice handicap currently imposed on conveyances lacking prescribed formality. If the evidentiary infirmity and the constructive notice handicap were abolished, then chains of title that included instruments lacking notarial formality would not be significantly[184] weaker than chains

182. BASYE, *supra* note 100, § 2, at 6.

183. *Id.* § 5, at 30; Johnson, *Purpose and Scope of Recording Statutes*, 47 IOWA L. REV. 231, 243 (1962).

184. The presence of a notarial certificate would produce some additional security in those jurisdictions where the burden is on the party opposing the conveyancing to show inauthenticity by clear and convincing evidence. See notes 118-19 & accompanying text *supra*. The clear and convincing evidence standard is more difficult to establish than the balance of probabilities standard under the USLTA. Thus, careful conveyancers still may elect to complete the acknowledgment ritual in a jurisdiction that has adopted the USLTA to gain the advantage of the clear and convincing evidence standard. Another reason to

of title composed entirely of acknowledged or proved conveyances, and the utility of having the recorder guard against formally deficient instruments would almost entirely disappear. Thus, the substantial administrative cost presumably involved in a diligent review of the formalities present in all incoming conveyances[185] could be saved.

Empowering the recorder to turn away instruments lacking proper notarial formality might be justified as a means of thwarting the species of conveyancing fraud that does not involve deceiving the judicial factfinder. A wrongdoer who is a complete stranger to the title may record a false deed showing title in himself or herself. The victim who relies on the record and gives value to the wrongdoer loses both the land and the money. If the recorder rejects informal instruments offered for recording, the danger of this sort of mischief is reduced.

The justification for the recorder's duty as a guardian of authenticity, however, overestimates both the vigilance of the average recorder and the effectiveness of the notarial device as a deterrent to fraud. In a high volume real estate market, those in charge of official land records generally pay little attention to the niceties of notarial formality when taking instruments for recording.[186] Moreover, even if one assumes that recordkeepers are vigilant, there is reason to doubt whether a wrongdoer sophisticated enough to manipulate the recording system to perpetrate a fraud would be deterred by the necessity of a certificate of acknowledgment. Surely a certificate could be manufactured with relative ease, or the wrongdoer could choose a notary who lacked the time or the shrewdness to detect an imposter.[187] Finally, if the notary is an effective guard

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expect continued use of the notary is that the USLTA does not alter the authentication rule for unrecorded conveyances. See notes 115-19 & accompanying text *supra*.

185. But see note 186 *infra*.

186. "Alas, too many recording officers have not observed . . . irregularities and have accepted and recorded countless numbers of imperfect instruments having substantial infirmities in their acknowledgments." BASYE, *supra* note 100, § 241, at 541. "This statement of Professor Basye accords with the comment made by a lawyer correspondent in North Carolina that the trouble with the records in his county is that 'the clerk would allow love letters to be recorded if accompanied by the requisite recording fee.'" Webster, *Toward Greater Marketability of Land Titles—Remedying the Defective Acknowledgment Syndrome*, 46 N.C.L. REV. 56, 63 n.26 (1967). "[O]ne wag tells of the county clerk who would put a menu on record if a fee were tendered." J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 279, 280 (2d ed. 1975).

187. "Phony Notary seals on fraudulent property deeds are appearing with increasing frequency in the nation's high-volume real estate markets.

against fraud, nothing prevents transferees from insisting on acknowledged instruments, whatever the law may be regarding proper recording. Thus, on balance, a rule allowing recordkeepers to turn away notarially informal conveyances can be said to do little good and cause little harm—hardly a persuasive argument for invoking the bureaucratic machinery.

None of the consequences now associated with the notarial prerequisites for recording can be adequately justified. Therefore, USLTA section 2-301, which abolishes all such prerequisites,[188] ought to be adopted.

Traditional Justifications for Legal Formality

Apart from the specific evidentiary and recording issues, several arguments used primarily in the context of wills might be advanced for maintaining conveyancing formality. The applicability of these general justifications to conveyancing is outlined below.

The Evidentiary Justification

Some disputes, such as those involving the validity of a purported formal will, inevitably arise because the testator or other transferor is not present to testify. In such cases the legal system has been reluctant to trust the usual modes of proof available in the judicial factfinding process.[189] Thus, formal devices such as attestation and acknowledgment have been required to assure the court that the testator's signature was not forged and that the instrument was signed with the proper intent.[190]

Although this rationale for the use of formality superficially resembles the evidentiary rules about conveyancing formality, fail-

"Reports from law enforcement agencies and Notary—commissioning officials in several states indicate increasing use of phony seals—either counterfeits duplicating valid Notary seals or seals acquired using false names.

"Most often, the seals are imprinted on fraudulent property grant deeds on which a swindler has forged the signatures of the property owner and listed himself as purchaser. He then has the fraudulent deed recorded and 'sells' the property to an unsuspecting mortgage company at a discount rate or uses it as collateral to obtain a loan.

"Another scam is for a swindler to pose as a lender in order to receive FHA or GI loan insurance as compensation for fictitious default on a home loan." THE NATIONAL NOTARY, Nov.-Dec. 1979, at 14.

188. See note 95 & accompanying text *supra*.

189. Gulliver & Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 4 (1941) [hereinafter cited as Gulliver & Tilson].

190. *Id.* at 6-9.

ure to comply with prescribed formality under the wills acts voids the instrument altogether.[191] The factfinder simply is not trusted with evidence of the genuineness of the will other than the evidence produced by compliance with the statutory formality. As already noted,[192] however, in the overwhelming majority of jurisdictions a conveyance is valid between the parties although unacknowledged, unproved, and unwitnessed. The evidentiary consequences of informality, moreover, reflect a clear willingness to trust the usual factfinding process; a conveyance lacking a proper acknowledgment is admissible in evidence if some further proof of due execution is presented.[193]

The Cautionary Justification

Formal devices also have been justified as checks against inconsiderate action. The use of the seal in its original form is an example: "The affixing and impressing of a wax wafer—symbol in the popular mind of legalism and weightiness—was an excellent device for inducing the circumspective frame of mind appropriate in one pledging his future. To a lesser extent any requirement of a writing, of course, serves the same purpose, as do requirements of attestation, notarization, etc."[194]

The cautionary justification is a weak explanation for the requirement of conveyancing formality for the same reason that the evidentiary function is an unsatisfactory rationale: If the rules requiring acknowledgments and kindred rituals were meant to serve a cautionary purpose, the logical consequence of noncompliance would be invalidity of the instrument, but a conveyance generally is valid between the parties and against all with actual notice despite the lack of a proper notarial certificate. The constructive notice rules, which generally protect only those third parties who fail to search the real estate records with ordinary care, do not function as a check against inconsiderate action by grantors.[195]

191. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975).

192. See note 34 & accompanying text *supra*.

193. See notes 105-14 & accompanying text *supra*.

194. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800 (1941).

195. Another reason for the irrelevance of the cautionary function in the conveyancing context is suggested by the contrast to a wills context: "A will is said to be revocable and ambulatory, meaning that it becomes operative only on death. Because the testator does not part with the least incident of ownership when he makes a will, and does not experience the

The Protective Justification

In discussing the formalities mandated by wills acts, courts have noted that some formalities are a means to protect the testator against imposition at the time of execution.[196] The assumption underlying these prophylactic measures, for example, that attesting witnesses sign in the presence of the testator and that the witnesses be disinterested,[197] is that imposition otherwise would likely go undetected.[198] The use of formalities as a guard against impositions arises in other legal contexts as well. Many early American statutes required a wife to acknowledge before a neutral official her willingness to join in a proposed conveyance by her husband, thereby releasing her rights in the land.[199]

Again, however, if the modern rules about conveyancing formality were meant to guard against undetected imposition, failure to complete the notarial ritual would void the conveyance between the parties. Even assuming that the protective function is a rationale for conveyancing formality, arguments for eliminating this function are convincing. As has been argued in the wills context,[200]

'wrench of delivery' required for inter vivos gifts, the danger exists that he may make seeming testamentary dispositions inconsiderately, without adequate forethought and finality of intention." Langbein, *Substantial Compliance with the Wills Act,* 88 HARV. L. REV. 489, 494-95 (1975) (footnotes omitted).

196. *See* Gulliver & Tilson, *supra* note 189, at 9.

197. *Id.* at 10-11.

198. *Id.* at 9.

199. For example, an early Georgia statute provided: "*Whereas,* the usual method of conveying lands and tenements in *England,* by feme coverts, is by fine or recovery, which methods have not been practiced in any of his Majesty's *American* colonies: *And whereas,* instead thereof, it has been customary in the conveyances of land by husband and wife, for the wife to acknowledge her consent before a judge or justice, being first privately examined by the said judge or justice whether she acknowledged the same voluntarily and freely . . . .

"*Be it therefore enacted* . . . that . . . where a feme covert has or may have any right in part or the whole of the lands and tenements to be conveyed, and the said feme covert doth willingly consent to part with her right, by becoming a party with her husband in the sale of such lands and tenements, in such cases as these the said feme covert shall become a party with her husband in the said deed of conveyance, and sign and seal the same before the chief-justice or assistant judges, or one of his Majesty's justices of the peace for the parish where such contracts shall be made, declaring before the said judge or justice, that she has joined with her husband in the alienation of the said lands and tenements of her own free will and consent, without any compulsion or force used by her said husband to oblige her so to do . . . ." Act of April 24, 1760, *reprinted in* THE EARLIEST PRINTED LAWS OF THE PROVINCE OF GEORGIA 1755-1770, at 85-86 (Glazier 1978).

200. *See* Gulliver & Tilson, *supra* note 189, at 9-13. Significantly, the authors state during the course of their analysis of the protective function in the wills context that they could discern no such purpose for the formal requirements for inter vivos dispositions.

every formality "should have a clearly demonstrable affirmative value"[201] because failure to comply with one formality may jeopardize an otherwise valid transaction.[202] Furthermore, civil and possible criminal liability may be more effective deterrents to fraud.[203]

The Channeling Justification

The legal system and the parties to transactions both are arguably benefited if the legal system states, before any transactions have occurred, that a transaction employing the formal device *X* will be given legal effect *Y* by the courts. The legal system benefits because the courts are able quickly and accurately to identify transactions intended by the parties to have legal effect *Y*. The parties benefit because formal device *X* is a relatively unambiguous symbol they can employ with certainty to communicate with each other, with third parties, and with the courts. This concept has been called "the channeling function" of legal formality.[204] The seal, for example, which induced a circumspect frame of mind in its user, also "serve[d] to mark or signalize the enforceable promise."[205]

The notarial device, like all formalities, has some channeling effect. A recorded, acknowledged deed is a relatively clear signal that the parties intended to effect a conveyance. The channeling justification is not persuasive, however, unless it is first assumed that the channeling advantage outweighs the costs of prescribed formality and, second, that the channeling advantage could not be substantially secured in some less costly fashion. A less costly alternative is available: the simple act of *recording* a signed instrument would be a sufficiently clear signal of the parties' intentions. Acknowledgment is a superfluous signal.

The negative channeling effect[206] also must be considered. The statute of frauds, for example, has such a negative effect because it offers a means to assure one of *not* being bound.[207] The rules about

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Id. at 9.

201. *Id.*

202. See notes 56-94 & accompanying text *supra.*

203. USLTA § 2-201, Comment 3; *see also* Gulliver & Tilson, *supra* note 189, at 9.

204. Fuller, *Consideration and Form,* 41 COLUM. L. REV. 799, 801-03 (1941).

205. *Id.* at 801.

206. *Id.* at 802.

207. *Id.*

conveyancing formality cannot be explained on those grounds, again because the consequence of noncompliance is *not* complete invalidity of the conveyance; the instrument is valid between the parties and against third persons with notice.

Conclusion

Reform of American conveyancing formality is not a new subject for scholars[208] or legislatures,[209] but prior to the USLTA no comprehensive challenge had been presented to the traditional uses of formality in the context of land transfers. The onus of the current law is clear. Legitimate transactions deserving legal protection are put at risk. The effectiveness of the notarial institution is particularly questionable in a high volume real estate market where the tendency inevitably is to reduce the notarial ritual to one more operation in the assembly-line production of a completed land transfer. The USLTA's drafters concluded that "[w]hatever the office of notary public once was, other methods, in particular civil liability for slander of title and possible criminal sanctions now appear to provide more effective and less burdensome methods of discouraging fraudulent behavior."[210] The USLTA provisions abolishing the evidentiary and constructive notice handicaps now imposed on physically recorded but notarially deficient conveyances deserve the careful attention of the state legislatures.

208. *E.g.*, BASYE, *supra* note 100, § 241, at 540; Maxwell, *The Hidden Defect in Acknowledgment and Title Security*, 2 U.C.L.A. L. REV. 83 (1954); Webster, *Toward Greater Marketability of Land Titles—Remedying the Defective Acknowledgment Syndrome*, 46 N.C.L. REV. 56, 63 n.26 (1967).

209. See notes 134-52 & accompanying text *supra*.

210. USLTA § 2-201, Comment 3.